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{SHDKT } PROCEEDINGS AND ORDERS DATE: 013185

CASE NBR 83-1-06673 ASY CASE STATUS: DECIDED
SHORT TITLE Rodrigues, Rodrigo DOCKETED: May 4 1984
VERSUS Hawaii

Entry	Date	Note	Proceedings and Orders
1	May 4 1984	D	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
4	May 14 1984		Order extending time to file response to jurisdictional statement until July 1, 1984.
5	Jun 7 1984		Order further extending time to file response to jurisdictional statement until August 1, 1984.
6	Aug 2 1984		DISTRIBUTED. September 24, 1984
7	Aug 3 1984	X	Motion of appellee Hawaii to dismiss or affirm filed.
8	Aug 9 1984	X	Reply brief of appellant Rodrigo Rodrigues filed.
10	Oct 1 1984		REDISTRIBUTED. October 5, 1984
12	Oct 18 1984		REDISTRIBUTED. October 26, 1984
14	Oct 29 1984		REDISTRIBUTED. November 2, 1984
16	Nov 5 1984		REDISTRIBUTED. November 9, 1984
18	Nov 13 1984		REDISTRIBUTED. November 21, 1984
20	Nov 26 1984		REDISTRIBUTED. November 30, 1984

CONTINUE {

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CASE NBR 83-1-06673 ASY CASE STATUS: DECIDED
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Entry	Date	Note	Proceedings and Orders
22	Dec 3 1984		REDISTRIBUTED. December 7, 1984
24	Dec 10 1984		Appeal DISMISSED for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.) **********
25	Jan 9 1985		Judgment issued.

JURISDICTIONAL STATEMENT

(2)

83-6673

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

RODRIGO RODRIGUES, Appellant

v.

STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME COURT OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, after a felony defendant has been acquitted by the trial court on the basis of physical or mental disease, disorder or defect excluding penal responsibility in a pretrial hearing before a jury has been impanelled, a state may, consistent with defendant's double jeopardy rights guaranteed by the Fifth Amendment to the United States Constitution, appeal that judgment of acquittal and seek and obtain a further trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

RODRIGO RODRIGUES, Appellant

v.

STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME COURT OF HAWAII

JURISDICTIONAL STATEMENT

I. OPINIONS BELOW

The opinion of the Hawaii Supreme Court has not yet been published. A copy of the slip opinion appears in the Appendix hereto at pages 1-28, and will be cited herein as "Opinion".

A copy of the Hawaii Supreme Court's Order Denying Appellant's Motion for Reconsideration appears at Appendix page 29. A copy of the Hawaii Supreme Court's Order staying its mandate and entry of judgment appears at Appendix pages 30-31. A copy of the trial court's Order Granting Motion for Judgment of Acquittal appears at Appendix pages 32-33.

II. JURISDICTION

The opinion of the Hawaii Supreme Court remanding for trial below was entered on March 8, 1984. Appellant's timely Motion for Reconsideration was denied on March 28, 1984. On April 6, 1984, the Hawaii Supreme Court stayed its mandate and entry of judgment pending receipt of this Court's ruling.

Notice of Appeal to this Court was duly filed in the Hawaii Supreme Court on April 18, 1984, and appears at Appendix pages 34-36.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

Hawaii Revised Statutes § 641-13 provides in pertinent part:

> **By State in criminal cases.** An appeal may be taken by and on behalf of the State from the district or circuit courts to the supreme court, subject to chapter 602, in all criminal cases, in the following instances:
>
> * * *
>
> (2) From an order or judgment, sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy; . . .

Hawaii Revised Statutes § 704-400 provides in pertinent part:

> **Physical or mental disease, disorder, or defect excluding penal responsibility.** (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Hawaii Revised Statutes § 704-408, as effective at the time of the alleged offenses here, provided as follows:

> **Determination of irresponsibility.** If the report of the examiners filed pursuant to section 704-404 states that the defendant at the time of the conduct alleged suffered from

> a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that such impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.[1/]

[1/] The Hawaii legislature subsequently amended H.R.S. § 704-408 to delete the provision for a pretrial determination of irresponsibility by the court and to provide for a unitary trial of both guilt and responsibility by the trier of fact. Amended § 704-408 reads as follows:

> If the report of the examiners filed pursuant to Section 704-404, or the report of examiners of the defendant's choice under Section 704-409, states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, the court shall submit the defense of physical or mental disease, disorder, or defect to the jury or the trier of fact at the trial of the charge against the defendant.

The act amending § 704-408 provided that the amendment not apply to any offense occurring prior to its effective date, June 7, 1980. The acts alleged here occurred in 1979 and no contention is made that the subsequent amendment is applicable to the instant case.

IV. STATEMENT OF THE CASE

A. Proceedings Below.

On November 20, 1979, Appellant was indicted on three counts of sodomy in the first degree and one count of rape in the first degree. Appellant timely raised the defense of mental disease, disorder or defect excluding penal responsibility, Hawaii Revised Statutes § 704-400. Pursuant to H.R.S. § 704-404, the trial court suspended proceedings and appointed a three-member medical panel to examine Appellant and report its findings. On October 16, 1980, Appellant filed a Motion for Judgment of Acquittal. Consolidated hearings were held on the Motion for Acquittal and a Motion for Determination of Fitness to Proceed.

On January 9, 1981, the trial court found Appellant incapable of understanding the proceedings and thus unable to assist in his defense, and suspended the proceedings, committing Appellant to the custody of the Hawaii State Hospital, where he received treatment for approximately eighteen months.

On June 25, 1982, the parties stipulated to Appellant's fitness to proceed, and hearings on the Motion for Judgment of Acquittal resumed. At those hearings, Appellant introduced the testimony of five psychiatrists, including members of the Court-appointed panel, Appellant's treating physician at the Hawaii State Hospital, and privately-retained psychiatrists, to establish his claim of mental defect, disease or disorder excluding responsibility. While the testimony of Appellant's experts varied in its details, all agreed that he suffered from multiple personalty syndrome, a mental defect. Appellant's experts

differed in their assessment of the number of personalities present, but all testified that Appellant, and/or one or more of his separate personalities lacked the capacity to appreciate the wrongfulness of his conduct and/or the capacity to conform that conduct to the requirements of the law.

The State introduced the testimony of Dr. Emily Khaw, one of the Court-appointed psychiatrists, who disputed the diagnosis of multiple personality syndrome and testified that Appellant suffered from sexual perversion, pedophilia. She stated that the Appellant knew what was wrong and could conform his behavior to the requirements of the law, although it was difficult for him to do so.

On August 27, 1982, the trial court granted Appellant's Motion for Judgment of Acquittal, committing him to the Hawaii State Hospital. On September 3, 1982, the State of Hawaii appealed that Order Granting Motion for Judgment of Acquittal to the Hawaii Supreme Court. The Hawaii Supreme Court, in a three-two decision, vacated the trial court's judgment and remanded for a further trial. Opinion, page 13, Appendix page 15.

B. Raising the Federal Question.

The double jeopardy issue thus first arose when the State appealed the trial court's judgment of acquittal, with H.R.S. § 641-13(2) purportedly conferring jurisdiction on the Supreme Court of Hawaii to hear such an appeal. The Federal Constitutional issue was first raised by the Hawaii Supreme Court, sua sponte, at oral argument. The decision of the Hawaii Supreme Court, attached hereto at Appendix 1-28, was a three-two decision, with two justices dissenting

in a lengthy opinion based upon the Federal Constitutional claim advanced here. The majority opinion explicitly considered and denied Appellant's Federal Constitutional double jeopardy claim:

> Under H.R.S. § 641-13(2), an appeal may be taken by and on behalf of the State "from an order or judgment, sustaining a special plea in bar, or dismissing a criminal case where the defendant has not been put in jeopardy." Double jeopardy does not attach unless there is a risk of a determination of guilt.
>
> * * *
>
> Hawaii case law has recognized two inquiries which must be made to determine whether double jeopardy has attached. The first is to determine when jeopardy attaches, and the second is to determine if, on the facts of the case, a retrial is barred by the double jeopardy clause. State v. Miyazaki, 64 Haw. 411, 645 P.2d 1340 (1982). Here no jeopardy attached. This was a pretrial motion to determine whether defendant at the time of the offense charged was unable to appreciate the wrongfulness of his conduct or to control his conduct to the requirements of the law. There was no possibility of a conviction, and thus a trial is not barred by the double jeopardy clause of the Fifth Amendment. Opinion, 12, 13, appearing at Appendix pages 14, 15 [emphasis added].2/

On March 19, 1984, Appellant petitioned the Hawaii Supreme Court for reconsideration, urging that he be permitted to fully brief and argue the Federal Constitutional issues. Appellant's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration appear at Appendix pages 37-43. Appellant's Motion for Reconsideration was denied by Order of March 28,

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2/ The reference is to the Fifth Amendment to the United States Constitution; the parallel double jeopardy prohibition of the Hawaii State Constitution is found at Art. I, § 10.

1984; the two justices who dissented from the Court's earlier opinion did not concur in the denial. This appeal followed.

C. Appellate Jurisdiction Exists Pursuant to 28 U.S.C. 1257(2).

The decision of the Hawaii Supreme Court is a "final judgment or decree rendered by the highest court of a state," 28 U.S.C. 1257, which may be reviewed here. Although further state court proceedings are contemplated, such proceedings would themselves deny the very federal Constitutional right the vindication of which is sought here. Colombo v. New York, 405 U.S. 9 (1972) (double jeopardy); Abney v. United States, 431 U.S. 651 (1977) (same).

Although raised by the Hawaii Supreme Court sua sponte, the Federal Constitutional question here was explicitly considered and disposed of by that Court and is thus properly before this Court. Whitney v. California, 274 U.S. 357, 360-361 (1927); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914); Coleman v. Alabama, 377 U.S. 129, 133 (1964), Raley v. Ohio, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.")

Appellant invokes the appellate jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2), on the principle that the Hawaii Supreme Court explicitly construed a Hawaii statute, H.R.S. § 641-13(2) to confer jurisdiction on appeal and to permit that court to order a further trial below after Appellant's acquittal by the trial court, over a clear

challenge that such a procedure was repugnant to the Fifth Amendment to the United States Constitution. The statute is not on its face repugnant to the Constitution, providing simply that "[a]n appeal may be taken by . . . the State . . . in all criminal cases . . . from an order or judgment . . . dismissing the case where the defendant has not been put in jeopardy," id.; however, as authoritatively construed by the Supreme Court of Hawaii to permit an appeal and retrial here it clearly infringes upon Appellant's Constitutional protections and an appeal under 28 U.S.C. § 1257(2) lies. This Court has held the validity of a state statute to have been sustained, within the meaning of 28 U.S.C. § 1257(2), when a state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n. 3 (1963); Cohen v. California, 403 U.S. 15, 17-18 (1971). Cf. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 79-80 (1980) ("Here the California Supreme Court decided that Art. I, §§ 2 and 3 of the California Constitution gave appellees the right to solicit signatures on appellants' property in exercising their state rights of free expression and petition. In so doing, the California Supreme Court rejected appellants' claim that recognition of such a right violated appellants' 'right to exclude others,' which is a fundamental component of their federally protected property rights. Appeal is thus the proper method of review.")

Appellant recognizes that, because of the facial neutrality of the challenged statute here, the instant case

may be thought to be controlled by Kulko v. Superior Court of California, 436 U.S. 84 (1978), where this Court held jurisdiction by appeal not to lie but a petition for a writ of certiorari to be appropriate to seek review. In Kulko, the challenged statute provided that the state's longarm jurisdiction be as broad as permitted by the United States Constitution; given such a statute explicitly incorporating Constitutional criteria, there could be no claim of repugnancy to the Constitution. While the Hawaii statute uses the same word — "jeopardy" — as the Fifth Amendment to the United States Constitution, Appellant believes this falls far short of an incorporation of Fifth Amendment standards into the challenged statute, as in Kulko. Rather, H.R.S. § 641-13(2), as authoritatively construed by the Hawaii Supreme Court's definition of "jeopardy", is repugnant to the Fifth Amendment, and jurisdiction in this Court exists pursuant to 28 U.S.C. § 1257(2). In the event that this Court finds such appellate jurisdiction to be lacking, Appellant requests that the papers herein be acted upon as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103. Hanson v. Denckla, 357 U.S. 235 (1958); May v. Anderson, 345 U.S. 528 (1953); Kulko v. Superior Court of California, supra; Calder v. Jones, ____ U.S. _____, 104 S.Ct. 1482 (1984).

V. THE QUESTION IS SUBSTANTIAL

A. The Decision of the Hawaii Supreme Court Conflicts With Prior Decisions of This Court and Operates to Deny Appellant's Fifth Amendment Rights.

A Hawaii statute governing the narrowly-circumscribed privilege of the government to appeal an unfavorable result in a criminal case has been construed to permit appeal and retrial following a judgment of acquittal by a trial court on insanity grounds after the reception of factual and opinion evidence of Appellant's physical or mental disease, disorder, or defect as excluding penal responsibility. The decision of the Hawaii Supreme Court is a violation of Appellant's Fifth Amendment double jeopardy rights, and stands in direct conflict with this Court's decisions in Burks v. United States, 437 U.S. 1 (1978) and United States v. Scott, 437 U.S. 82 (1978). This Court should note probable jurisdiction to review the claim of repugnancy of the state statute under which the State's appeal was taken to the United States Constitution.

Under the Hawaii procedure in force at the time of the alleged incident here, once a criminal defendant introduces evidence sufficient to overcome the initial presumption of sanity, the state must establish, as a threshold matter to the satisfaction of the trial judge, and, if that threshold is passed, to the jury or trier of fact, that the defendant was sane beyond a reasonable doubt. State v. Nuetzel, 61 Haw. 531, 606 P.2d 920 (1980); State v. Valentine, 1 Haw.App. 1, 612 P.2d 117 (1980).

That threshold inquiry before the trial judge below constituted an exhaustive inquiry occupying some ten days of court time in which the court heard the testimony of

seven expert witnesses, including Appellant's treating physician at the Hawaii State Hospital who had spent more than six hundred hours in therapy with Appellant, Opinion, page 8, Appendix page 10, and in which video tapes of Appellant in therapy during which the alleged multiple personalities manifested themselves were viewed by the court.

Under Hawaii law, the test to be applied by the trial court at that preliminary inquiry is whether, under the evidence presented below, a rational jury could find, beyond a reasonable doubt, that the defendant was responsible under H.R.S. § 704-400(1), that is, "sane". State v. Nuetzel, supra; State v. Freitas, 62 Haw. 17, 608 P.2d 408 (1980); State v. Summers, 62 Haw. 325, 614 P.2d 925 (1980). The test, then, requires the trial court to evaluate the sufficiency of the evidence presented by the prosecution to support a finding of sanity beyond a reasonable doubt. The trial court applied that test, and entered a judgment of acquittal for lack of penal responsibility pursuant to statute.

The decision of the Hawaii Supreme Court in first permitting an appeal of that final judgment, and in then remanding the case for a trial on the merits of both sanity and guilt was clear error, and is violative of this Court's

holdings in Burks v. United States, 437 U.S. 1 (1978) and United States v. Scott, 437 U.S. 82 (1978).3/

Burks v. United States, supra, holds that where a judgment of acquittal is entered after an evaluation of the prosecution's evidence and a determination that that evidence was legally insufficient to sustain a conviction, further prosecution is barred by the Fifth Amendment. This is precisely what occurred below. The teaching of United States v. Scott, supra, is that an appeal by the government is foreclosed on double jeopardy grounds when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), quoted in United States v. Scott, supra, at 437 U.S. 97. Scott explicity cited the "essentially factual defense of insanity," id., as an example of such a resolution barring further prosecution.

In Burks, unlike the instant situation, it was not

3/ In the event this Court treats this appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, see discussion at pages 9-10, supra, the Court may wish to note, pursuant to Rule 17.1(b) of its Rules, that the decision of the Hawaii Supreme Court appealed from stands in conflict with the decisions of at least two other state courts of last resort. State v. Abraham, 335 N.W.2d 745 (Minn. 1983) (defendant acquitted on pretrial motion to court raising entrapment defense, apparently before jury impanelled; held, jeopardy attached and state's appeal of acquittal and further trial barred); State v. Greenwalt, 663 P.2d 1178 (Mont. 1983) (acquitted by trial court on motion for insufficient evidence after impanelling of jury).

the trial court, but an appellate court which evaluated the sufficiency of the government's evidence and determined it to be insufficient to sustain a conviction. In its holding that such a finding by the Court of Appeals precluded further prosecution, this Court analogized the situation in Burks to one in which the judgment of acquittal based upon insufficiency of the evidence was made by the trial court in the first instance — that is, to precisely the case at bar:

> It is unquestionably true that the Court of Appeals' decision "represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). By deciding that the government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. See Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).
>
> * * *
>
> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199. Burks v. United States, supra, at 437 U.S. 10-11 [emphasis added].

Not only is the posture of the instant case precisely that of the hypothetical a fortiori situation postulated in Burks, the standard of decision by the Hawaii court below was identical to the federal standard. That federal standard and its relation to double jeopardy principles was set forth in Burks:

> The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt.
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> * * *
>
> Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the government an opportunity for the preverbal "second bite at the apple." Burks v. United States, supra, at 437 U.S. 16, 17 [citations omitted, emphasis added].

The test to be applied by the trial court in ruling on Appellant's Motion for Acquittal below was identical:

> The standards by which a motion for a judgment of acquittal on the grounds of physical or mental irresponsibility is to be determined is whether upon the evidence, viewed in the light most favorable to the government, and giving full play to the right of the jury to determine credibility, weigh the evidence, and draw therefrom justifiable inferences of fact, a jury might fairly and rationally conclude that the accused was sane beyond a reasonable doubt.
>
> * * *

> If the evidence on the issue is such that a jury must necessarily have a reasonable doubt as to the defendant's sanity at the time of the commission of the offense, the defendant is entitled to a judgment of acquittal. State v. Nuetzel, supra; United States v. Westerhausen, 283 F.2d 844 (7th Cir. 1960). Where, however, the evidence is such that a jury might fairly have or not have a reasonable doubt as to the defendant's sanity, the issue becomes a question of fact for the jury, and the motion for judgment of acquittal will be denied. Stated another way, it is only when there is no evidence upon which the jury might fairly find the defendant sane beyond a reasonable doubt that the motion will be granted. State v. Freitas, 62 Haw. 17, 21, 608 P.2d 408, 411 (1980), quoted in State v. Summers, 62 Haw. 325, 327-8, 614 P.2d 925 (1982).

During final argument in the trial court, both the prosecutor and defense counsel quoted this language to the trial judge. Transcript of Proceedings, August 27, 1982, 42:6-43:1; 52:2-15, appearing at Appendix pages 44-46.

That the acquittal below was based on a sufficiency of the evidence standard is made clear by the admission of the prosecutor, at closing argument, that she had failed to bring forth all the evidence available:

> [The Court]: But what the legislature did in 1972, as the Court understands, is that they removed it from a jury context and placed it in court context prior to trial did not preclude any of the parties to produce the proof that would have been elicited in front of a jury.
>
> * * *
>
> But the defense is not precluded from calling other experts and neither the prosecution from lay testimony as a foundation. And that, I believe, was totally done. That was not the legislative intent to exclude lay testimony.
>
> [Prosecutor]: Well, then, it was this Prosecutor's error in not bringing forth all of the other evidence that we would have presented at trial. However, I still feel that there has been presented during the

hearing enough for you to deny this motion. Transcript, supra, at 31:16-21, 32:515, appearing at Appendix, pages 47, 48 [emphasis added].

B. Even if the Trial Court Committed Legal Error in Entering a Judgment of Acquittal, Reversal and Retrial is Prohibited by the Double Jeopardy Clause.

The majority opinion of the Hawaii Supreme Court finds that the trial judge, rather than applying the sufficiency of the evidence standard set forth above, ". . . improperly weighed the testimony of the doctors, and acted as a trier of fact rather than a judge on the motion for acquittal." Opinion, page 11, Appendix page 13. The majority opinion holds that "[t]he judge acted improperly in granting the motion for acquittal in this case." Id. at 12, Appendix page 14. Although this Court may wish to give considerable weight to that finding of the Hawaii Supreme Court on an issue of Hawaii law, this Court is not bound by that finding, for the jurisdiction of the Hawaii Supreme Court below rests on the very statute challenged for Constitutional infirmity here. That statute, H.R.S. § 641-13, permits an appeal by the State "from an order or judgment . . . dismissing the case where the defendant has not been put in jeopardy" [emphasis added]. It is the Hawaii Supreme Court's application of that statute to the facts of the instant case to find that jeopardy did not attach and that it had jurisdiction of the State's appeal which is the issue for review in this Court, see Dahnke-Walker Milling Co. v. Bondurant, supra, and other

cases cited at page 9, supra. If this Court finds the Hawaii statute, as construed by the Hawaii Supreme Court's definition of "jeopardy," repugnant to the Fifth Amendment of the United States Constitution, it necessarily finds that the Hawaii Supreme Court was without jurisdiction to review Appellant's acquittal below, rendering its holding a nullity. Sanabria v. United States, 437 U.S. 54 (1978). In Sanabria, the parallel federal statute permitting government appeals in certain criminal matters, 18 U.S.C. § 3731, conferred jurisdiction on the Circuit Courts of Appeal "except that no appeal shall lie where the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." This Court found that the District Court's acquittal in Sanabria, even though based on an erroneous evidentiary ruling, operated to bar further prosecution and thus, under 18 U.S.C. § 3731, prevented jurisdiction in the Court of Appeals from attaching:

> To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error.
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> * * *
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> The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo v. United States makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances. The Court of Appeals thus lacked jurisdiction of the Government's appeal.

Sanabria v. United States, supra, 437 U.S. 54, 68-69, 78.4/

However, even assuming, arguendo, the correctness of the Hawaii Supreme Court's ruling on the trial court's misapprehension of the standard of decision below, the critical element of double jeopardy jurisprudence remains that even if the decision of the trial court was an erroneous one, that Court's acquittal is final and non-appealable for double jeopardy purposes. Fong Foo v. United States, 369 U.S. 141 (1962); Sanabria v. United States, supra. The teaching of this Court's double jeopardy cases is precisely that the double jeopardy clause accords "absolute finality", Burks v. United States, supra, at 437 U.S. 16, to judgments of acquittal, "no matter how erroneous." Id. "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the

4/ The dissent below recognized that the validity of H.R.S. § 641-13 as against a challenge on double jeopardy grounds was jurisdictional: "[t]he pertinent inquiry at the very outset must be whether an appeal lies. 'The objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court of its motion.' For it is fundamental that 'parties cannot by waiver confer jurisdiction over the subject matter upon the court.' . . . I would dismiss the appeal for want of jurisdiction." Dissenting opinion of Nakamura, J., 5, 13, Appendix pages 20, 28 [citation omitted].

Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" United States v. Scott, supra, at 437 U.S. 90, quoting from Green v. United States, 355 U.S. 184, 188 [emphasis added]. Indeed, the essence of the proscription against double jeopardy is that an appeal from a judgment of acquittal based upon a ruling by the court that the evidence is insufficient to acquit may not be appealed and terminates the prosecution, even if the state could show that the trial court's ruling was erroneous. Id.; Fong Foo v. United States, supra; United States v. Martin Linen Supply Co., supra. The dissenting justices of the Hawaii Supreme Court recognized this essential character of the double jeopardy doctrine:

> That the acquittal may have resulted from an erroneous application of controlling legal principles as the majority holds, may affect "the accuracy of that determination, but . . . does not alter its essential character." United States v. Scott, 437 U.S. at 98. It still "represents a resolution [in the defendant's favor], correct or not, of some . . . of the factual elements of the offense[s] charged." United States v. Martin Linen Supply Co., 430 U.S. at 571. State v. Rodrigues, ___ Haw. ___, ___ P.2d ___, dissenting opinion of Nakamura, J., 12-13, appearing at Appendix pages 27-28

When the trial court acquitted the Appellant, it "evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction," Martin Linen, supra, 430 U.S. at 572, United States v. Scott, supra, 437 U.S. at 97; its judgment "represent[ed] a resolution [in the defendant's favor], correct or not, of

some or all of the factual elements of the offense charged." Martin Linen, supra, 430 U.S. at 571, United States v. Scott, supra, 437 U.S. at 97. Under the teaching of this Court in Martin Linen, supra, Scott, supra, and Burks, supra, the bar of double jeopardy prohibits further prosecution of the Appellant even if that judgment can be shown to have been based on an erroneous legal standard.

This Court's later decisions in Tibbs v. Florida, 457 U.S. 31 (1982) and Hudson v. Louisiana, 450 U.S. 40 (1981), support Appellant's position here. In Tibbs, this Court held double jeopardy considerations not to bar a retrial when a state appellate court set aside a judgment of conviction on the ground that the verdict was against the weight of the evidence. Here, even accepting the Hawaii Supreme Court majority's finding that the trial court erroneously weighed the evidence, rather than ruling upon its sufficiency, the judgment which was reviewed by the Hawaii Supreme Court was not that of an appellate court setting aside a conviction, as in Tibbs, supra, but that of an acquittal by a trial court. As this Court has held:

> An acquittal is accorded special weight. "The Constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See Fong Foo v. United States, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." Arizona v. Washington, 434 U.S., at 503, 98 S.Ct., at 829. The law "attaches particular significance to an acquittal." United States v. Scott, 437 U.S., at 91, 98 S.Ct., at 2193.

> This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S., at 188, 78 S.Ct., at 223. See also, United States v. Martin Linen Supply Co., 430 U.S., at 571, 573, n. 12, 97 S.Ct., at 1354, 1355, n. 12. "[W]e necessarily afford absolute finality to a jury's verdict of acquittal — no matter how erroneous its decision". Burks v. United States, 437 U.S., at 16, 98 S.Ct., at 2149.
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> * * *
>
> It is acquittal that prevents a retrial even if legal error was committed at the trial. United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). This is why the "law attaches particular significance to an acquittal." United States v. Scott, 437 U.S., at 91, 98 S.Ct., at 2193. United States v. DiFrancesco, 449 U.S. 117, 129-130, 132 (1980).

In Hudson v. Louisiana, supra, this Court again differentiated between an acquittal based on insufficiency of the evidence, which precludes further prosection on double jeopardy grounds, and an acquittal on the weight of the evidence, in Hudson, under a Louisiana procedure in which the trial judge, acting as a "thirteenth juror" could weigh the evidence and order a new trial if his assessment of the weight of the case differed from that of the convicting jury's. Hudson held that the situation presented in that case was in fact one of an acquittal based on insufficiency of the evidence and was controlled by Burks v. United States, supra. Hudson v. Louisiana, supra, at 450 U.S. 43. A footnote in Hudson left open the question of "whether the Double Jeopardy Clause would have barred Louisiana from retrying petitioner if the trial court had granted a new trial in that capacity [i.e., as a "thirteenth

juror" weighing the evidence]," id. at 44, n. 5, holding that question not then before the Court. Nor is that question present here, even accepting the Hawaii Supreme Court's decision that the trial judge here committed error by improperly weighing the evidence. For the question left open by Hudson's footnote 5 deals with a state trial court which properly weighs the evidence under a state's "thirteenth juror" standard, and then acquits on that basis. Here, Hawaii has no such "thirteenth juror" statute, and the only acquittal permitted a trial judge is one based on the sufficiency of the evidence. State v. Nuetzel, supra; State v. Freitas, supra; State v. Summers, supra. At most, then, the trial court's judgment of acquittal amounted to the application of an erroneous standard of law as found by the Hawaii Supreme Court majority. The doctrine of double jeopardy nonetheless accords "absolute finality," Burks v. United States, supra, at 437 U.S. 16, to such an acquittal, "no matter how erroneous." Id.; Fong Foo v. United States, supra. Cf., this Court's discussion of Fong Foo in Sanabria v. United States, 437 U.S. 54 (1978):

> In deciding whether a second trial is permissible here, we must immediately confront the fact that petitioner was acquitted on the indictment. That "[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution," has recently been described as "the most fundamental rule in the history of double jeopardy jurisprudence." The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is "based upon an egregiously erroneous foundation." In Fong Foo the Court of Appeals held that the District Court had erred in various rulings and lacked power to direct a verdict of acquittal before the Government rested its case. We accepted the Court of Appeals' holding that the District

> Court had erred, but nevertheless found that the Double Jeopardy Clause was "violated when the Court of Appeals set aside the judgment of acquittal and directed that petitioners be tried again for the same offense." Thus when a defendant has been acquitted at trial, he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous. Sanabria v. United States, 437 U.S. 54, 64 (1978) [footnotes and citations omitted, emphasis added].

The Fifth Amendment's bar to double jeopardy is, of course, binding upon the states. Benton v. Maryland, 395 U.S. 784 (1969); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978). Although, as noted above, the Hawaii statute here has since been amended to replace the pretrial ruling by the Court on insanity with a unitary submission of both guilt and sanity issues to the jury so that the precise question here could not again arise, that change in law neither deprives this Court of jurisdiction nor renders the instant dispute moot. Grayned v. City of Rockford, 408 U.S. 104 (1972); Reed v. Reed, 404 U.S. 71 (1971). Nor, of course, is the dispute moot as to Appellant, who faces further prosecution in the Hawaii state courts.[5/] Sibron v. New York, 392 U.S. 40 (1968).

As discussed in the cases cited above, this Court has attached particular significance to the double jeopardy

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[5/] Because of the multiple offenses charged, Appellant, if convicted after a further trial, faces the potential of a sentence of imprisonment for an "extended indeterminate term," H.R.S. § 906-661, up to and including life imprisonment. Id.; H.R.S. § 706-662(4).

prohibition after an acquittal, according "absolute finality", Burks, supra, at 437 U.S. 16, to such judgments:

> [W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no "equities" to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.
>
> * * *
>
> [W]hen a defendant's conviction has been overturned due to a failure of proof at trial . . . the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not even have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. Burks v. United States, supra, at 437 U.S. 11, n. 6, 16. [Emphasis is original.]

By its construction of H.R.S. § 641-13(2) to permit appellate reversal and further prosecution after an acquittal based upon insufficiency of the evidence below, the Hawaii Supreme Court has violated the teachings of this Court's cases as set out above, and is permitting "the State with all its resources and power . . . to make repeated attempts to convict [Appellant] for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188 (1957).

VI. CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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May 2, 1984

APPENDIX

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

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STATE OF HAWAII, Plaintiff-Appellant, vs. RODRIGO RODRIGUES, Defendant-Appellee.

NO. 8865

APPEAL FROM THE FIRST CIRCUIT COURT

HONORABLE WENDELL K. HUDDY, JUDGE

(CRIMINAL NO. 53619)

MARCH 8, 1984

LUM, C.J., NAKAMURA, PADGETT, HAYASHI AND WAKATSUKI, JJ.

CRIMINAL LAW - capacity to commit and responsibility for crime - capacity in general.

A defendant is presumed sane in every criminal case but the burden of proof may shift to the State to prove the defendant sane beyond a reasonable doubt if evidence rebuts the presumption.

SAME - same - same.

The law adjudges criminal liability according to a person's state of mind at the time of an act. Courts will not begin to parcel criminal accountability out among various inhabitants of a mind in cases of multiple personalities. The person will be held criminally responsible for his acts if the personality in control at the time of the offense was sane.

SAME - evidence - opinion evidence - experts.

The court must exercise discretion when determining whether the testimony of an expert witness is admissible and the decision will not be disturbed on appeal unless that discretion was clearly abused.

SAME - same - same - same.

Neither the court nor the jury are bound by testimony of experts as to sanity or mental state of an accused since they are entitled to make their own assessment of the expert's opinion.

SAME - capacity to commit and responsibility for crime - in general.

The issue of sanity is a question for the jury where the jury might fairly have or not have a reasonable doubt as to defendant's sanity. In such a case a motion for judgment of acquittal should be denied.

SAME - former jeopardy - preliminary or summary proceedings.

Jeopardy does not attach at pretrial proceedings where defendant is not subjected to the hazards of trial and the possibility of conviction, thus, a review of a lower court decision acquitting defendant at such a proceeding does not place defendant in double jeopardy.

OPINION OF THE COURT BY HAYASHI, J.

This is an appeal by the State of Hawaii from a judgment of acquittal granted by Judge Huddy under Hawaii Revised Statutes (HRS) § 704-408. Appellant claims, and we agree, that there was sufficient evidence presented so as to require the judge to present the issue of sanity to the jury.[1/] We also decide that a defense of multiple personality syndrome (MPS) does not per se require a finding of acquittal.

Defendant was indicted on November 20, 1979, on three counts of sodomy in the first degree (HRS § 707-733(1)(a)(i)) and one-count of rape in the first degree (HRS § 707-730(1)(a)(i)). His victims were all young girls, whom he would lure into secluded areas. He filed a notice of intention to rely on the defense of mental disease, disorder or defect under HRS § 704-404(1) on March 12, 1980. Defendant had previously been examined by Vadim P. Kondratief, M.D. in California, who referred defendant to Bernauer W. Newton, Ph.D., also in California, both of whom testified for the defense.

On March 17, 1980, the court pursuant to HRS § 704-404(2), ordered further mental examination of the defendant to be performed by three court appointed psychiatrists; Drs. Creighton U. Mattoon, Emily Khaw and Gene Altman.

1/ HRS § 704-408 was amended by the legislature in 1980 to require the court to submit the issue of criminal responsibility to the jury or trier of fact at the trial of the charges against the defendant. The amendment does not apply to this case however, since it does not apply to any crime which occurred prior to June 7, 1980.

On October 16, 1980, the defendant filed a motion for judgment of acquittal. Hearings on that motion and a motion for closure of the hearings were held intermittently beginning December 1, 1980. On December 2, the court consolidated the hearing on the motion for acquittal with a motion for determination of fitness to proceed.

On January 9, 1981, the judge found defendant unable to assist in his defense, and pursuant to HRS § 704-406 suspended the proceedings, deferring the matter of acquittal.

For the next year and a half, State psychiatrist Dr. Morgan treated defendant at Kaneohe, Hawaii State Hospital, and on June 25, 1982, the defendant was brought back into court. The defendant was presented as fit to proceed, so the court renewed hearings on the motion for the judgment of acquittal. On August 27, 1982, the judge granted the motion, and this appeal followed.

I.

In every criminal case there exists a presumption that a defendant is sane. This presumption can be overcome by evidence to the contrary, and then the State has the burden of proving a defendant's sanity beyond a reasonable doubt. State v. Valentine, 1 Haw. App. 1, 612 P.2d 117 (1980).

The defendant in the case at hand introduced testimony from five psychiatrists to rebut the presumption of sanity. There was no contention that this was not sufficient to rebut the presumption. Accordingly, the burden of proof shifted to the State to prove, beyond a reasonable doubt, that appellant was sane at the time of the offenses.

The testimony introduced by the defense addressed the fact that under HRS § 704-408, a defendant will be relieved of criminal responsibility if at the time of the alleged conduct the defendant suffered from a mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. In support of his motion for acquittal, the defendant raised the defense that at the time of the offense he was suffering from multiple personality syndrome, which should exclude his responsibility for his actions.

Multiple personality syndrome (MPS) is a disorder where there are within one individual, two or more distinct personalities, each of which is dominant at a particular time. Each individual personality is complex and integrated with its own behavior pattern and the personality that is dominant at any particular time determines the individual's behavior. Often there is amnesia on the part of one personality for the existence of the other.[2/]

The defense of MPS was raised in connection with HRS § 704-408 because one personality often cannot control the actions of another personality. This disorder is extremely rare, and has recently come to the attention of several courts. The trend in these courts is toward examining the sanity of each personality presented in an individual, or at least the personality which allegedly committed the offense.

2/ French and Shechmeister, The Multiple Personality Syndrome and Criminal Defense, 11 Am. Acad. Psych. & L. Bull. 1 at 17-25 (1983).

> The law adjudges criminal liability of the person according to the person's state of mind at the time of the act; we will not begin to parcel criminal accountability out among the various inhabitants of the mind.

Kirkland v. State, 166 Ga. App. 478, 304 S.E.2d 561 at 564 (1983). Recent cases dealing with the multiple personality defense have held that it is immaterial whether the defendant was in one state of consciousness or another, so long as in the personality then controlling the behavior, the defendant was conscious and his or her actions were a product of his or her own volition. State v. Darnall, 47 Or. App. 161, 614 P.2d 120 (1980); State v. Grimsley, 3 Ohio App. 3d 265, 444 N.E.2d 1071 (1982); and Kirkland, supra.

The cases dealing with MPS can be examined in a similar fashion as other defenses of insanity. If a lunatic has lucid intervals of understanding he shall answer for what he does in those intervals as if he had no deficiency. The law governs criminal accountability where at the time of the wrongful act the person had the mental capacity to distinguish between right and wrong or to conform his conduct to the requirements of the law. Since each personality may or may not be criminally responsible for its acts, each one must be examined under the American Law Institute (ALI)-Model Penal Code (MPC) competency test. See State v. Nuetzel, 61 Haw. 531, 606 P.2d 920 (1980); and Kirkland, supra.

II.

Before we examine the testimony relating to the competency of the alleged personalities of the defendant elicited from the

psychiatrists, we must address defendant's claim that the court erred in not striking the testimony of one of the psychiatrists, Dr. Khaw.

Generally, in determining whether the conclusions or opinions of an expert witness are admissible, the court must exercise a large measure of discretion with which an appellate court is reluctant to interfere unless that discretion has been manifestly abused to the prejudice of the complaining party. State v. Torres, 60 Haw. 271, 589 P.2d 83 (1978); 31 Am. Jur. 2d Expert and Opinion Evidence § 3. The determination of qualification is in the first instance for the court, and is discretionary. But qualifications also go to weight, and Hawaii Rules of Evidence (HRE) Rule 702.1, expressly provides for cross-examination on this subject. See, State v. Okura, 56 Haw. 455, 541 P.2d 9 (1975).

The standard of review therefore, is whether the court abused its discretion in failing to strike the testimony. Defendant argues, and we agree, that the qualifications and methodology of the doctor had been seriously called into question, and we also agree that the trial court gave little, if any weight to Dr. Khaw's testimony.

> Court: I'll find her qualified as a psychiatrist, and in that capacity, with expertise to render diagnosis and treatment of people who may or may not be affected with a mendal [sic] disorder, which includes multiple personality. But it's always for the trier of fact to weigh and evaluate the opinion of any expert, and the trier of fact may accept or reject it. So the question is again to the weight and effect for trier of fact to give to the testimony.

Tr. 1/6/81 at 49. But we disagree with defendant's contention that:

> [h]ad defendant's motion (to strike Dr. Khaw's testimony) been granted, the court below would have been entirely without any evidence or

> inferences required to be drawn therefrom pursuant to State v. Freitas, supra, and State v. Summers, supra, other than the exensive [sic] evidence of insanity and lack of penal responsibility adduced by defendant. On that state of the record, the judgment of acquittal below would have been compelled.

Defendant's Answering Brief at 30. Defendant has failed to show a clear abuse of discretion or any resulting prejudice from the introduction of the testimony, because as will be noted below, the question of acquittal was one for the jury or trier of fact, who could have given Dr. Khaw's testimony the weight it deserved. There was also other evidence elicited from the other psychiatrists which could support an inference that defendant was sane.

III.

An examination of the testimony of the psychiatrists reveals that few of the experts agreed as to any of their opinions.

Dr. Kondratief, the first to examine the defendant, had not treated nor diagnosed anyone who had MPS, and had only seen two or three cases of MPS. Before he referred the defendant to Dr. Newton, he had formed a diagnosis that the defendant was suffering from fugue, temporary amnesia or MPS. After discussing the matter with Dr. Newton, he formed a final diagnosis of MPS. His opinion was that defendant as a whole lacked substantial capacity to appreciate the wrongfulness of his conduct and also lacked substantial capacity to control his conduct to the requirements of the law. He testified that personality A had no control or knowledge of personality B. He also testified that B was not capable of understanding the proceedings against him, but never expressed his opinions as to whether A or B

could control their actions or appreciate the wrongfulness of their conduct as separate personalities.

Dr. Newton treated the defendant through hypnosis, and prepared tapes of his sessions which allegedly showed defendant's several personalities. He had diagnosed seventeen cases of MPS and had treated eleven patients for MPS, and stated that the defendant as a whole was capable of appreciating the wrongfulness of his conduct, but was not capable of conforming his conduct to the requirements of the law. He stated that personality A understood the charges against him and could conform his behavior to the requirements of the law. He testified that defendant was in the B state when he committed the acts, and that B could appreciate the wrongfulness of his acts but could not conform his behavior to the requirements of the law.

Dr. Altman, one of the court appointed psychiatrists, had never treated or diagnosed any cases of MPS. After viewing a summary tape prepared by Dr. Newton, and discussing the case with Dr. Newton, he came to his diagnosis that defendant suffered from MPS. He stated that personality B had committed the offenses, that B knew that what he was doing was wrong, and that B had some degree of volitional control over his actions.

Dr. Khaw, another court appointed psychiatrist, had never treated nor diagnosed nor even seen a case of MPS. After viewing the summary tape prepared by Dr. Newton, she still claimed to never have seen a case of MPS. Her diagnosis was that defendant's mental condition was sexual perversion, pedophilia. She stated that defendant knew what was wrong and could conform his behavior to the requirements of the law, although it was difficult for him to do so.

Dr. Mattoon, the last of the court appointed psychiatrists, testified that he had never diagnosed, treated, nor seen anyone with MPS. He diagnosed defendant as having MPS after talking with Dr. Newton for four hours in the court halls before testifying. He stated that both A and B could understand that the acts were wrong, but that it did not matter to B. He testified that A could control himself to the requirements of the law, as could B, and that it was B who performed the acts.

Finally Dr. Morgan, who had treated six cases of MPS, stated that he wasn't sure that the defendant had MPS until after he began treating him. (Dr. Morgan had testified earlier that defendant had MPS, but after treating the defendant he testified that during his earlier testimony he actually was unsure of whether defendant had MPS.) After treating him for approximately six hundred hours, Dr. Morgan came to the conclusion that defendant had in fact three personalities: personality A, named Rod, was defendant's normal waking state; personality B, named David, emerged at age sixteen and was the mediating personality between Rod and the final personality; the last personality's name was Lucifer, who emerged at age three, and who had taken over at the times of the offenses. Dr. Morgan testified that the defendant as a whole lacked the capacity to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of the law. He testified that A and B knew that the acts were wrong but that C did not care whether they were right or wrong and that A and B had the capacity to conform their conduct to the requirements of the law but C did not care about his conduct or the consequences.

A summary of the testimony of all the psychiatrists reveals that: defendant had anywhere from one to three personalities; A could appreciate the wrongfulness of his acts and conform his behavior to the requirement of the law, but could not control B; B could understand the wrongfulness of his conduct but could or could not (depending on whose testimony was more persuasive) control his behavior to the requirements of the law; and C did not care whether what he did was right or wrong or about the consequences of his conduct. Dr. Khaw, theorizing there was one personality, testified A committed the acts; four doctors theorizing there were two personalities, testified B committed the acts; and Dr. Morgan testified that C executed the crimes.

IV.

In light of the above testimony, we find merit to the appellant's claim that the judge erred in granting the acquittal without giving the matter to the jury. The standard of review on appeal is that it is a jury question unless a reasonably minded jury viewing the facts and inferences in a light most favorable to the prosecution would necessarily possess a reasonable doubt as to defendant's sanity. State v. Nuetzel, 61 Haw. 531, 606 P.2d 920 (1980). State v. Freitas, 62 Haw. 17, 608 P.2d 408 (1980), held that where the evidence is such that a jury might fairly have or not have a reasonable doubt as to defendant's sanity, the issue becomes a question of fact for the jury, and a motion for judgment of acquittal will be denied. The testimony in this matter is disjointed and:

> [w]hat psychiatrists may consider a mental disease

> or defect for medical purposes where clinical treatment is the main concern may not be the same as mental disease or defect for the jury's purpose where an accused's criminal responsibility is at issue.

State v. Nuetzel, Haw. at 543, P.2d at 928. The expert may testify as to mental states, but they are not competent to render an opinion as to the impact of the mental state on legal accountability. This is a question for the jury where, as here, there are diverse opinions as to which personality performed the acts and whether that personality was sane or not.

The purpose of expert testimony is to assist the trier of fact on matters not of common knowledge, where the witnesses have knowledge, training and experience enabling them to form a better opinion on a given state of facts than that formed by those not so well equipped. 31 Am. Jur. 2d Expert Opinion and Testimony § 16. The jury is entitled to know the facts on which an expert bases his opinion in order to make its own assessment of the expert's opinion and the reliability of the diagnostic and analytical process employed. State v. Summers, 62 Haw. 325, 614 P.2d 925 (1980).

> It is well settled that we are not bound by expert testimony as to the sanity or mental state of an accused, even where it is undisputed, but the fact finder may reject it out of hand.

Kirkland, supra, at 565, see also, Bachran v. Morishige, 52 Haw. 61, 469 P.2d 808 (1970). Since the jury may reject an expert's testimony, it would appear axiomatic that they could reject part of the testimony of an expert. Thus they could accept one psychiatrist's testimony as to whether a defendant could appreciate the wrongfulness of his

actions, and accept another psychiatrist's testimony regarding the capability of the defendant to conform his conduct to the requirements of the law. They could therefore arrive at a conclusion conjectured by no one expert alone.

V.

It also appears in this case, that the trial judge improperly weighed the testimony of the doctors, and acted as a trier of fact rather than a judge on the motion for acquittal.

> The Court: The only question that the Court had in that regard was Dr. Khaw's testimony. But in review of her testimony, giving full weight and effect to her testimony, the Court placed some emphasis on her testimony to the effect that she believed that it was very, very hard for the defendant to control his conduct or to conform his conduct to the requirements of law. She used phrases such as "very, very hard." "I think he can." "Difficult." And, when the Court weighs that testimony along with the testimony of Dr. Newton and the other doctors who have testified, the Court has reached the conclusion that necessarily a judgment of acquittal is required in this case.

Tr. 8/27/82 at 60-61.

> The Court: The impact, the effect of the weight of the testimony is for the trier of facts.
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> * * *
>
> The Court: ... I can weigh it.

Tr. 12/16/80 at 54. The weighing of testimony is reserved for the jury or trier of fact unless no reasonable juror could disagree as to an outcome. State v. Summers, supra. The sanity issue before this court and the role of the jury was discussed in Nuetzel.

> The jury, as the trier of facts, remains the sole sentinel in the protection of both the rights of the accused and the welfare of society, enabled finally to consider all relevant facts pertaining to the defendant's state of mind at the time the act was committed, and being thereby better qualified to render its ultimate moral judgment under the law.

State v. Nuetzel, 61 Haw. at 543, P.2d at 928. The judge acted improperly in granting the motion for acquittal in this case.

We hold therefore, that the question of defendant's sanity at the time of the offense and the corresponding question of which personality was present at the time of the offense were questions properly for the jury or the trier of fact.

VI.

While defense counsel at oral argument conceded that this court probably had jurisdiction under HRS § 641-13(2) to hear this case because no jury had been impanelled, we feel it necessary to discuss the issue of double jeopardy.

Under HRS § 641-13(2), an appeal may be taken by and on behalf of the State "from an order or judgment, sustaining a special plea in bar, or dismissing a criminal case where the defendant has not been put in jeopardy." Double jeopardy does not attach unless there is a risk of a determination of guilt. Serfass v. United States, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1974). In State v. Hagerud, 174 Mont. 361, 570 P.2d 1131 (1977), defendant was acquitted by reason of mental defect excluding responsibility in a pretrial evidentiary hearing to determine whether defendant at the time of the offense charged was so clearly unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law that

trial would be useless. On appeal, the court held that the defendant was never once put in jeopardy as he was never subjected to the possibility of conviction of the crime charged and, thus, to permit the State to obtain review of the district court's decision acquitting defendant did not put defendant in double jeopardy in violation of his constitutional rights.

Hawaii case law has recognized two inquiries which must be made to determine whether double jeopardy has attached. The first is to determine when jeopardy attaches, and the second is to determine if, on the facts of the case, a retrial is barred by the double jeopardy clause. State v. Miyazaki, 64 Haw. 611, 645 P.2d 1340 - (1982). Here no jeopardy attached. This was a pretrial motion to determine whether defendant at the time of the offense charged was unable to appreciate the wrongfulness of his conduct or to control his conduct to the requirements of the law. There was no possibility of a conviction, and thus a trial is not barred by the double jeopardy clause of the Fifth Amendment.

Accordingly, the decision of the lower court is vacated and the case remanded for further proceedings consistent with this opinion.

Arthur E. Ross (Ernest J. Freitas, Jr. on the reply brief), Deputy Prosecuting Attorneys, for plaintiff-appellant

John S. Edmunds (Ronald J. Verga, with him on the brief; John S. Edmunds, A Law Corporation, of counsel) for defendant-appellee

DISSENTING OPINION OF NAKAMURA, J.,
WITH WHOM WAKATSUKI, J., JOINS

The court, on an appeal brought by the State, vacates a judgment of acquittal entered by the circuit court and remands the case for a redetermination of criminal responsibility. In my opinion the decision is unprecedented, unauthorized, and unconstitutional.

I.

After his indictment by the Grand Jury on three counts of sodomy and one count of rape, the defendant gave notice in accord with Hawaii Revised Statutes (HRS) § 704-404(1) [1/] of an "intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility" and moved for a mental examination. Thereupon, the proceedings against him were suspended, and the circuit court appointed two psychiatrists and a psychologist to examine the defendant. Although the three examiners initially found the defendant's capacity to understand the proceedings and assist in his own defense as well as his capacity to appreciate the wrongfulness of his conduct or to conform his

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1/ HRS § 704-404(1) reads:

> Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.

conduct to the requirements of law were unimpaired, two of them subsequently submitted amended reports indicating the presence of an impairing mental disorder.

Relying on these reports, the defendant asserted he could not be held responsible for the criminal acts charged and moved the court for a judgment of acquittal pursuant to HRS § 704-408. [2/] At the hearing on the motion, testimony supporting the claim of insanity was adduced from the members of the court-appointed panel of examiners who earlier found substantial impairment in defendant's capacity to appreciate the criminal nature of his conduct and from several other psychiatrists and psychologists. On the first day of the hearing on the motion to acquit, however, defense counsel also requested a determination of defendant's "capacity to understand the proceedings against him or to

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2/ Prior to its amendment in 1980, HRS § 704-408 read as follows:

> Determination of irresponsibility. If the report of the examiners filed pursuant to section 704-404 states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that such impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

The foregoing provisions are applicable to this case since the offenses alleged in the indictment occurred in 1978 and 1979 and the amendatory act expressly provided that the amendment would not apply to any offenses occurring before its approval. See S.L.H. 1980, c. 222, § 3.

assist in his own defense." [3] The hearing on this motion was consolidated with that already in progress, with the understanding that the court's ruling on defendant's fitness to proceed would be rendered prior to its consideration of the issues related to criminal responsibility.

After hearing the parties out on the question of defendant's fitness for trial, the circuit court decided he was then incompetent to proceed; it further found he posed a substantial danger to others in his mental state. Consequently, proceedings were suspended, and defendant was committed to the custody of the State Director of Health "for detention, care, and treatment for so long as such unfitness . . . [should] endure." [4]

Subsequently, when the circuit court was convinced that defendant's competency to stand trial had been restored, the hearing on the motion for acquittal was resumed. [5] After listening to additional testimony on the issue of criminal responsibility and being satisfied that the defendant's mental impairment when the offenses were committed "was sufficient to exclude responsibility," the circuit court entered a judgment of acquittal pursuant to HRS § 704-408. [6] See note 2 supra. The State's appeal to this court followed.

II.

"Save in certain instances . . . , the State has no appeal in a criminal case unless the defendants are convicted," Peters v. Jamieson, 48 Haw. 247, 256, 397 P.2d 575, 582 (1964); and save in a certain instance not applicable here, [7] "[r]ulings

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3/ HRS § 704-403 provides that:

> [n]o person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

4/ The commitment was pursuant to HRS § 704-406(1), which in relevant part provides:

> If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in section 704-407, and the court shall commit him to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for so long as such unfitness shall endure.

5/ HRS § 704-406(2) in relevant part provides:

> When the court, on its own motion or upon the application of the director of health, the prosecuting attorney, or the defendant, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the penal proceeding shall be resumed.

6/ The defendant, however, was not released from custody. He has remained in the custody of the State Director of Health under the court's order entered pursuant to HRS § 704-411(1), which in pertinent part reads:

> When a defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the court shall, on the basis of the report made pursuant to section 704-404, if uncontested, or the medical evidence given at the trial or at a separate hearing, make an order as follows:
>
> (a) The court shall order him to be committed to the custody of the director of health to be placed in an appropriate institution for custody, care, and treatment if the court finds that the defendant presents a risk of danger to himself or the person or property of others and that he is not a proper subject for conditional release . . . .

7/ HRS § 641-13 was amended in 1982 to authorize an appeal by the State from "a judgment of acquittal following a jury verdict of guilty." See S.L.H. 1982, c. 81, § 1.

prejudicial to the State and leading to an acquittal are never reviewed." Id. Thus, despite the defendant's concession "that this court probably had jurisdiction under HRS § 641-13(2) to hear this case," the pertinent inquiry at the very outset must be whether an appeal lies. 8/ I would say it does not.

The statute authorizing appeals by the State in criminal cases confers a right of appeal "in a limited number of enumerated instances," but "does not include in its enumeration a judgment of acquittal." State v. Shintaku, 64 Haw. 307, 310, 640 P.2d 289, 292 (1982). Claiming the appeal is actually from an order sustaining a special plea in bar, the State purports to seek review on the strength of HRS § 641-13(2) which sanctions an appeal "[f]rom an order or judgment, sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy." But "[t]he availability of appellate review sought by the State in a criminal case can be based only on clear statutory authority," State v. Johnson, 50 Haw. 525, 526, 445 P.2d 36, 37 (1968), and "[s]tatutes granting the State the right of appeal in criminal cases must be strictly construed. They are not to be enlarged by construction and cannot be extended beyond their plain terms." Territory v. Balarosa, 34 Haw. 662, 665-66 (1938); see also State v. Shintaku, 64 Haw. at 310-11, 640 P.2d at 292.

8/ "The objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court of its own motion." Territory v. Correa, 24 Haw. 165, 166-67 (1917). For it is fundamental that "parties cannot by waiver confer jurisdiction over the subject matter upon the court." Tong On v. Tai Kee, 11 Haw. 424, 427 (1898).

HRS § 641-13(2) sanctions an appeal from an order sustaining "a special plea in bar." At common law, such a plea "was ordinarily used to raise three defenses--autrefois acquit, autrefois convict, and pardon." United States v. Sisson, 399 U.S. 267, 300 n.53 (1970) (emphasis in original). We have said it "ordinarily presents some matter extrinsic of the record which completely bars the proceeding, such . . . as a plea of insanity, 9/ a plea of pardon, or a plea of former acquittal, conviction or jeopardy . . . ." State v. Johnson, 50 Haw. at 526, 445 P.2d at 37, quoting Territory v. Anderson, 28 Haw. 55, 58 (1919). But as the Supreme Court points out, "there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." United States v. Murdock, 284 U.S. 141, 151 (1931). Cf. United States v. Sisson, 399 U.S. at 301 ("a motion in bar cannot be granted on the basis of facts that would necessarily be tried with the general issue in the case.").

What was presented in support of the motion to acquit was hardly "some matter extrinsic of the record." What the court heard and evaluated was evidence of defendant's mental impairment that covered "matters of defense . . . on questions of law or

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9/ A plea of insanity that would present "some matters extrinsic of the record" and would be a plea in bar is a motion to determine fitness to proceed. A hearing thereon would not be to determine responsibility for the charged offense; it would only cover the defendant's fitness to stand trial. A determination of unfitness in this regard would constitute a bar to proceedings, since "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." Drope v. Missouri, 420 U.S. 162, 171 (1975); see also State v. Raitz, 63 Haw. 64, 67, 621 P.2d 352, 356 (1980).

fact." "Compelled as we are to strictly construe HRS § 641-13," State v. Shintaku, 64 Haw. at 310-11, 640 P.2d at 292, there is no warrant for reading "a special plea in bar" expansively to cover a motion for acquittal premised on a mental disorder sufficient to exclude criminal responsibility. Though the majority finds no cause to address the obvious discrepancy between a plea in bar and a motion to acquit, the significant difference between the two divests this court of jurisdiction to consider the State's appeal.

III.

Proceeding with the appeal, nonetheless, the majority finds the defendant has yet to be put in jeopardy, and concludes a reversal of the circuit court and a remand of the case for a redetermination of criminal responsibility would not run afoul of constitutional commands. The record, however, cannot sustain the finding, and a rerun of the hearing on mental impairment would transgress the cardinal rules of double jeopardy jurisprudence.

A.

"Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with criminal prosecution." Breed v. Jones, 421 U.S. 519, 528 (1975). The majority accepts the State's thesis that the defendant has not been in jeopardy even though he moved for acquittal on a ground that he was deranged when the criminal acts were committed and evidence in support of and in opposition to the motion was adduced. It assumes the "pre-trial motion" did not expose the defendant to a risk of conviction since the circuit court was not

empowered to enter a judgment of conviction pursuant to HRS § 704-408. 10/ Yet in fact, the defendant was in jeopardy when he sought acquittal and brought forth evidence on an essential element of the crimes charged in the indictment.

"Implicit in a motion for judgment of acquittal by reason of mental irresponsibility is the admission that the defendant committed the offense charged." State v. Lee, 61 Haw. 313, 314, 602 P.2d 944, 946 (1979). Here, what may have been implicit was rendered explicit by evidence submitted in support of the plea for acquittal. The testimony and the opinions of the psychiatrists and psychologists who examined the defendant were grounded in part on accounts furnished by him of the events leading to the prosecution. The videotaped interviews, tapes of which were made available to the State, undeniably implicated the defendant in the offenses charged.

His involvement is undeniable because the parties agreed, with court approval before the defendant submitted a plea for acquittal, that:

> in the event the case proceeds to trial on the merits and the Defendant takes the stand and directly contradicts, in the defense

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10/ True, HRS § 704-408 as it read before its amendment did not empower the court to render a judgment of conviction. Yet this is not dispositive.

The statute did not authorize the entry of a judgment of conviction because such authority would have infringed the right of criminal defendants to be tried by juries composed of their peers. A judgment of acquittal, of course, would not be deemed an infringement of this right. For while a "trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused," this "limitation on the role of a trial judge . . . has never inhibited his ruling in favor of a criminal defendant." United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977).

> case in chief, statements made by him during any of the audio cassette or video cassette interviews, the prosecution may introduce said portions of the audio-video cassette interviews for the purpose of seeking to impeach the Defendant's testimony . . . [and] if the Defendant takes the stand and if relevant, the Prosecution may cross examine the Defendant relative to any statements made by him during any audio or video interviews and that if relevant the Prosecution may introduce those portions of the audio or video interviews in rebuttal for the purpose of contradicting or impeaching him.

Thus, the die was cast when the claim of irresponsibility was advanced. The defendant committed himself thereby to pursue the defense of insanity to judgment, for he could not hope thereafter to controvert testimony that he had engaged in the proscribed conduct. 11/ Realistically, he ran a substantial risk of conviction by moving for an early determination of part of the general issue in the case and proceeding to a hearing.

B.

Built as it is on a misreading of "a special plea in bar" and an infirm factual foundation, the court's conclusion that the defendant would not be twice put in jeopardy by a second adjudication of an issue once adjudicated in his favor cannot be reconciled with prescribed constitutional standards in the area of concern.

Our concern here is with a judgment of acquittal and further jeopardy. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise,

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11/ This was confirmed during oral argument before this court. In response to a query on a related point, counsel for defendant unequivocally stated he would resubmit the issue of criminal responsibility to the trial court for decision on the evidence already adduced if the case is remanded.

without putting [a defendant] twice in jeopardy and thereby violating the Constitution.' United States v. Ball, 163 U.S. 662, 671 (1896)." United States v. Martin Linen Supply Co., 430 U.S. at 571. "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)).

But it is not only a verdict of acquittal returned by a jury that triggers the protection against the potential risk associated with further prosecution. A directed verdict of acquittal suffices in this regard, Fong Foo v. United States, 369 U.S. 141, 143 (1962), and so does "a judge's acquittal after the jury disagrees and is discharged." United States v. Martin Linen Supply Co., 430 U.S. at 574. And the governing principle formulated by the Supreme Court is: "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." United States v. Scott, 437 U.S. at 91 (footnote omitted). 12/

12/ No double jeopardy problems would be implicated in a government appeal from "a judgment of acquittal following a jury verdict of guilty," which is now allowed. See HRS § 641-13(a). For a reversal there would

Although a direct acquittal on a motion submitted before actual trial has not been discussed in the relevant case law, the Court has made it clear that the substance of the judge's action determines whether the acquittal would terminate the prosecution. The determinative question, the Court said, is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. at 571. Viewing what transpired below in the light of the Supreme Court's teachings, I would declare there was an acquittal that rules out further prosecution of the defendant.

C.

The defendant was accused of crimes for which a culpable state of mind is a necessary element. He sought a ruling from the circuit court on whether insanity prevented him from forming the required intent. The applicable statute, HRS § 704-408 as it read before its amendment in 1980, vested the court with full authority to directly acquit him if "satisfied" after a hearing that his mental impairment was sufficient to exclude responsibility, 13/ and the court did so. In effect, it weighed the evidence

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12/ (Continued).

result in a reinstatement of the verdict, not a retrial. See United States v. Wilson, 420 U.S. 332, 344-45 (1975).

13/ The applicable statute on its face empowered the court to directly acquit the defendant if "satisfied" his mental impairment was "sufficient to exclude responsibility." See note 2 supra. This more than implies

adduced by the parties and arrived at a decision that the State had failed to submit enough evidence "to rebut . . . [the] defendant's essentially factual defense of insanity." United States v. Scott, 437 U.S. at 97.

The circuit court, notwithstanding the majority's conclusion that the court was without power to do so, had clear authority to enter the judgment of acquittal. See note 12 supra. That the acquittal may have resulted from an erroneous application of controlling legal principles as the majority holds, may affect

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13/ (Continued).

the court was to weigh the evidence and rule on a factual element of the offenses. Any doubts on this score are laid to rest by the Penal Code Commentary on HRS § 704-408; it read as follows:

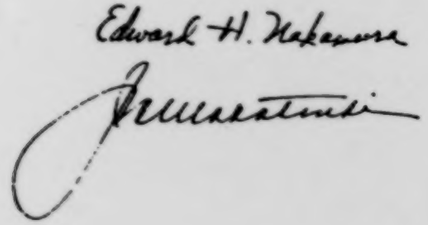
> This section provides for the direct qualified acquittal of the defendant when the report filed pursuant to §704-404 satisfies the court that at the time of the conduct alleged the defendant suffered from a physical or mental disease, disorder, or defect which precluded responsibility. A hearing shall be had on the issue of the defendant's responsibility if it is requested by either party or the court. If the court is satisfied on the basis of the report or the hearing or both that the defendant should not be held responsible for the conduct alleged, it shall, upon motion by the defendant, acquit the defendant. Thus, a trial in such cases will be avoided. If the defendant maintains that he did not engage in the conduct alleged, or has a defense in addition to that excluding responsibility, he can, of course, withhold the motion and the case will proceed to trial.
>
> The section changes the prior law in that it vests the power of direct acquittal in the court and does not make it dependent on prosecutorial discretion. (Emphasis added).

That HRS § 704-408 prior to its amendment was to be interpreted in the foregoing manner was reaffirmed when the section was amended. See Sen. Stand. Comm. Rep. No. 689-80, in 1980 Senate Journal, at 1335 (In commenting on the proposed amendment to HRS § 704-408, the Senate Judiciary Committee said: "Presently the law allows an insanity defense to be heard, and ruled on in the first instance, by a judge at a pre-trial hearing. The judge can enter a judgment of acquittal on the grounds of 'physical or mental disease, disorder, or defect excluding responsibility' or allow the defense to go to a jury.").

"the accuracy of that determination, but . . . does not alter its essential character." United States v. Scott, 437 U.S. at 98. It still "represents a resolution [in the defendant's favor], correct or not, of some . . . of the factual elements of the offense[s] charged." United States v. Martin Linen Supply Co., 430 U.S. at 571.

"The notion that the prosecution, having failed to make a sufficient case against . . . [the] accused, should be given a second opportunity to do better seems fundamentally inconsistent with the Double Jeopardy Clause." 2 C. Wright, Federal Practice and Procedure: Criminal 2d § 470, at 677-78 (1982) (footnote omitted). I would dismiss the appeal for want of jurisdiction.

Edward H. Nakamura



John Edmu

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

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STATE OF HAWAII, Plaintiff-Appellant, vs. RODRIGO RODRIGUES, Defendant-Appellee

NO. 8865

MOTION FOR RECONSIDERATION

(CRIMINAL NO. 53619)

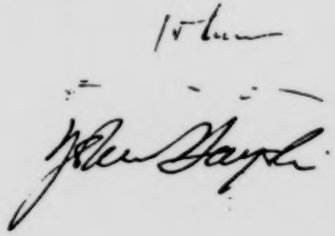
MARCH 23, 1984

LUM, C.J., NAKAMURA, PADGETT, HAYASHI AND WAKATSUKI, JJ.

Per Curiam. The motion for reconsideration is denied without argument.

Justices Nakamura and Wakatsuki, having dissented from the majority in the original opinion, do not concur.

Ronald J. Verga
(John S. Edmunds,
A Law Corporation,
of counsel) for
the motion



John L. Edmunds

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 53619
	)	
Plaintiff-appellant,	)	APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT ACQUITTAL, FILED AUGUST 27, 1982
	)	
vs.	)	
	)	
RODRIGO RODRIGUES,	)	FIRST CIRCUIT COURT
	)	
Defendant-Appellee.	)	HONORABLE WENDELL K. HUDDY Judge
	)	

FILED
1984 APR -6 PM 1:30
Eugene L. Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of Defendant Rodrigues' Motion for Stay of Mandate and the papers in support and opposition,

IT IS HEREBY ORDERED that the mandate of this court shall be stayed until receipt by this court of the decision of the United States Supreme Court on Defendant Rodrigues' petition for a writ of certiorari, or, in the event the Supreme Court grants said petition, until receipt by this court of the Supreme Court's decision on the merits and subsequent judgment; provided that the stay shall automatically expire if Defendant fails to file a petition with the Supreme Court by May 7, 1984. It shall be the responsibility of counsel for Defendant to notify this court and opposing counsel immediately if such a petition is not filed by May 7, 1984. In the

840507

interim, this court's judgment and notice of entry of judgment will remain unsigned, and it shall be the responsibility of the prevailing party to ensure that the judgment and notice of entry are signed and filed upon termination of the stay.

DATED: Honolulu, Hawaii, April 6, 1984.

SUPREME COURT Seal STATE OF HAWAII

FOR THE COURT:

Chief Justice

Of Counsel:
JOHN S. EDMUNDS
Attorney at Law
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Attorney for Defendant

FILED
AT 4:10 O'CLOCK P M
AUG 24 1982 19
J. M. DeCLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. RODRIGO RODRIGUES, Defendant.	CR. NO. 53619 ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL

ORDER GRANTING MOTION FOR
JUDGMENT OF ACQUITTAL

This matter having come on for hearing before the Honorable WENDELL K. HUDDY on August 27, 1982 at 8:30 a.m., and the Court, having considered the records and files herein, having heard the evidence and the arguments of counsel and after a thorough review of the transcripts of testimony previously taken in this case, and being fully advised of the premises herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant's Motion for Judgment of Acquittal on the charges of Sodomy in the First Degree on August 4, 1978; Sodomy in the First Degree on February 26, 1979; and Sodomy in the First Degree and Rape in the First Degree on November 9, 1979, is hereby granted pursuant to Hawaii Revised Statutes, Section 704-408 in

effect at the time of the commission of the alleged offenses.

IT IS FURTHER ORDERED that Defendant RODRIGO RODRIGUES, pursuant to Hawaii Revised Statutes 704-411(a), is hereby remanded to the Director of the State Department of Health for involuntary commitment to the Kaneohe State Hospital, or such other appropriate institution within the State of Hawaii as the Director of the State Department of Health may in his discretion determine, until Defendant shall be released in accordance with law.

DATED: Honolulu, Hawaii, AUG 27 1982.

WENDELL K. HUDDY
WENDELL K. HUDDY
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ Janice T. Futa
JANICE T. FUTA
Deputy Prosecuting Attorney

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

STATE OF HAWAII, Plaintiff-Appellant, vs. RODRIGO RODRIGUES, Defendant-Appellee.	)	CIVIL NO. 53619 APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL, FILED AUGUST 27, 1982 FIRST CIRCUIT COURT HONORABLE WENDELL K. HUDDY, Judge

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

and

CERTIFICATE OF SERVICE

JOHN S. EDMUNDS 734-0
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Attorneys for Defendant-Appellee
Rodrigo Rodrigues

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, vs. RODRIGO RODRIGUES, Defendant-Appellee.	)	CRIMINAL NO. 53619 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RODRIGO RODRIGUES, the Appellee above named, hereby appeals to the Supreme Court Of the United States from the final Order and Opinion of The Supreme Court Of The State Of Hawaii, vacating the judgment of acquittal entered by the Circuit Court and remanding for further proceedings, entered herein on March 8, 1984.

Appellee's Motion for Reconsideration was denied by Order of March 28, 1984; by Order of April 6, 1984, this Court stayed its Mandate, Judgment, and Notice of Entry of Judgment until receipt of the United States Supreme Court's decision on the merits of the appeal.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: Honolulu, Hawaii, April 18, 1984.

JOHN S. EDMUNDS
RONALD J. VERGA
PHILIP DOI
Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served one copy of the foregoing document upon the following individual at his last-known address by hand delivering said instrument on the date indicated below.

CHARLES F. MARSLAND, JR., ESQ.
Prosecuting Attorney
ARTHUR E. ROSS, ESQ.
Deputy Prosecuting Attorney
City and County of Honolulu
1164 Bishop Street
Honolulu, Hawaii 96813
Attorneys for State of Hawaii

DATED: Honolulu, Hawaii, April 18, 1984.

Diana Kawa
Secretary to John S. Edmunds

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

STATE OF HAWAII, Plaintiff-Appellant, vs. RODRIGO RODRIGUES, Defendant-Appellee.	CRIMINAL NO. 53619 APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL, FILED AUGUST 27, 1982 FIRST CIRCUIT COURT HONORABLE WENDELL K. HUDDY, JUDGE

MOTION FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

CERTIFICATE OF GOOD FAITH

and

CERTIFICATE OF SERVICE

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NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

STATE OF HAWAII,	)	CRIMINAL NO. 53619
Plaintiff-Appellant,	)	APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL, FILED AUGUST 27, 1982
vs.	)	
RODRIGO RODRIGUES,	)	FIRST CIRCUIT COURT
Defendant-Appellee.	)	HONORABLE WENDELL K. HUDDY, JUDGE

MOTION FOR RECONSIDERATION

Defendant-Appellee Rodrigo Rodrigues hereby moves this Honorable Court to reconsider its Opinion filed in this case on March 8, 1984. In said Opinion, three of the five Justices found the issue of double jeopardy to be unpersuasive, while the other two Justices based their dissent on that ground. Defendant-Appellee believes that the majority of the Court misapprehended this issue inasmuch as it was not briefed and argued by the parties. Defendant-Appellee believes that this Court should reconsider this case and allow the parties to submit briefs on the issue of double jeopardy. This motion is made pursuant to Rule 5 of the Rules of the Supreme Court of the State of Hawaii and it is based upon the attached Memorandum and upon all of the records and files in this case.

DATED: Honolulu, Hawaii, March 19, 1984.

JOHN S. EDMUNDS
RONALD J. VERGA
PHILIP DOI

Attorneys for
Defendant-Appellee

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

STATE OF HAWAII,	)	CRIMINAL NO. 53619
Plaintiff-Appellant,	)	APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL, FILED AUGUST 27, 1982
vs.	)	
RODRIGO RODRIGUES,	)	FIRST CIRCUIT COURT
Defendant-Appellee.	)	HONORABLE WENDELL K. HUDDY, JUDGE

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

On August 27, 1982, after lengthy hearings before the Circuit Court The Honorable Wendell K. Huddy entered his Order Granting Motion for Judgment of Acquittal. On September 3, 1982, the State of Hawaii filed its Notice of Appeal to this Court. Thereafter, the State filed its Opening Brief on March 14, 1983, Defendant filed his Answering Brief on July 28, 1983, and the State filed its Reply Brief on September 9, 1983. Oral argument was held on November 29, 1983.

In the Notice of Appeal, the State of Hawaii relied on Section 641-13 (2) of the Hawaii Revised Statutes as authority for allowing an appeal. That Section allows the State to appeal in criminal cases "From an order or judgment, sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy." Because this case does not involve a special plea in bar this Court can have jurisdiction over this case only if jeopardy has not yet attached in the proceedings before Judge Huddy. This issue will hereinafter be referred to as the "double jeopardy issue."

In all of the Briefs, there was no discussion of the jurisdiction of this Court based on the double jeopardy issue. At oral argument, the issue was briefly touched upon in response to questions from the Bench, but again there was no meaningful argument on the issue. At that time, defense counsel conceded that this Court probably had jurisdiction over this case.

Most recently, a majority of three members of this Court issued its opinion reversing the judgment of the Circuit Court. That majority opinion was accompanied by the dissenting opinion of the remaining two members of this Court. The dissenting opinion was based upon the double jeopardy issue, an issue which was neither briefed nor argued by the parties.

A similar situation was presented in the related cases of McBryde Sugar Co. v. Robinson, 54 Hawaii 174, reh'g. denied, 55 Hawaii 260 (1973), and Robinson v. Ariyoshi, 441 F.Supp. 559 (Dist. of Hawaii, 1977).

In the McBryde case, the respective parties (including the State) were contending over rights to water in the Hanapepe river. At trial, "[n]o one, not even the State, raised any question about the severability of water rights from the riparian lands along the River, or the right to transport the River's waters for use out of its watershed. Nor was any question raised about the rights of the parties to the normal flow of surplus waters of the River (excepting only certain claims of rights therein acquired by prescription). All parties took for granted that these rights were solidly embedded in the law of waters of Hawaii. No one even mentioned the possible application of the English common law doctrine of riparian rights to Hawaiian waters." Robinson v. Ariyoshi, supra, at 563. On appeal, the Supreme Court decided, sua sponte, without warning to the parties nor argument from them, that the State owned all of the waters of the river, subject only to

the English common law doctrine of riparian rights. The Court further held that there was no surplus water in any stream in the State of Hawaii and that certain parties (Gay & Robinson and McBryde Sugar Company) had no right to divert their appurtenant waters of the river outside its watershed. All of these decisions were made without any argument or discussion from any of the parties.

Thereafter, one of the parties ("Robinson") brought suit in Federal Court alleging in part, that the McBryde decision had deprived it of due process of the law. Judge Pence's opinion in Robinson v. Ariyoshi clearly holds that the State Supreme Court, in deciding on issues which were never raised or argued by the parties consitutes a deprivation of Constitutional rights without a fair and meaningful opportunity to defend those rights. Robinson v. Ariyoshi, supra at 580.

Robinson v. Ariyoshi is controlling in the instant case. In this case, two members of the Court have grounded their opinion, favorable to the Defendant, on an issue which was neither briefed nor argued by the parties. The majority of three Justices discussed the issue but briefly in the majority opinion and decided the issue adversely to the Defendant. If the Defendant is not allowed the opportunity to brief and, perhaps, argue this issue, it will, under the principle of Robinson, constitute a denial of due process to the Defendant. On that basis, Defendant-Appellee respectfully submits that the instant Motion for Reconsideration should be granted and that this Court should allow the filing of briefs and oral argument on this issue.

Counsel for the Defendant-Appellee is sensitive to the fact that there has been an opportunity to raise and argue the double jeopardy issue in the Answering Brief, and that this Court's probable jurisdiction was conceded at oral argument. If this Court is inclined to deny this Motion based in part or in whole on those facts, then the Court

should be aware that defense counsel is willing to obtain new counsel for the Defendant in order to brief and argue the double jeopardy issue. In any event, the Defendant's rights, as opposed to any rights, privileges, or duties of counsel, are protected by the Constitution and Defendant should be allowed the opportunity to present argument on the double jeopardy issue upon this Court's reconsideration of its opinion.

DATED: Honolulu, Hawaii, March 19, 1984.

JOHN S. EDMUNDS
RONALD J. VERGA
PHILIP DOI

Attorneys for
Defendant-Appellee

NO. 8865

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

STATE OF HAWAII,	CRIMINAL NO. 53619
Plaintiff-Appellant,	APPEAL FROM THE ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL, FILED AUGUST 27, 1982
vs.	
RODRIGO RODRIGUES,	FIRST CIRCUIT COURT
Defendant-Appellee.	HONORABLE WENDELL K. HUDDY, JUDGE

CERTIFICATE OF GOOD FAITH

The undersigned, counsel for Defendant-Appellee Rodrigo Rodrigues, hereby certifies that the foregoing Motion for Reconsideration is being presented to this Court in good faith and not for purposes of delay.

DATED: Honolulu, Hawaii, March 19, 1984.

JOHN S. EDMUNDS
RONALD J. VERGA
PHILIP DOI

Attorneys for
Defendant-Appellee

looking at the --

THE COURT: Excuse me. There is one legal problem. Must not the State at this hearing convince the Court on the basis of this record that the defendant was responsible beyond a reasonable doubt?

MS. FUTA: Your Honor, I believe that the standard is quite clear and is clearly stated in the Freitas case. And, if I may quote, it says, "The standard by which a motion for judgment of acquittal on the grounds of physical or mental irresponsibility is to be determined is whether, upon the evidence viewed in the light most favorable to the government and giving full play to the right of the jury to determine credibility, weigh the evidence, and draw therefrom justifiable inferences of fact, a jury might fairly and rationally conclude that the accused was sane beyond a reasonable doubt.

"Where, however, the evidence is such that a jury might fairly have or not have a reasonable doubt as to the defendant's sanity, the issue becomes a question of fact for the jury and the motion for judgment of acquittal will be denied."

Stated another way, it is only when there is no evidence upon which the jury might fairly find the defendant sane beyond a reasonable doubt that the

motion will be granted.

So, in answer to your question, Your Honor, I would submit no. I believe that as long as there has been evidence or even lack of evidence presented which the jury might find --

THE COURT: Wait a minute. Now, this is a problem that we have with the law. Is it really a jury question or am I the jury in this case?

MS. FUTA: Your Honor, I believe that because this is a pre-trial motion for judgment of acquittal, what you have to find, as stated in Freitas -- Freitas was also a pre-trial motion for judgement of acquittal -- that, if there is evidence upon which a jury might reasonably find the defendant sane beyond a reasonable doubt, then cannot grant this motion. And I'm saying that that's exactly what has been shown through the defense's own evidence and experts.

THE COURT: But you still -- you've been evading Dr. Khaw. So I take it your position is that the Court should reject Dr. Khaw's testimony.

MS. FUTA: Well, Your Honor, I would submit that, based upon the state of the art of psychiatry, you would have to look questioningly at all psychiatric testimony. And I believe, however, that Dr.

that certain of the specific claimed biases --

THE COURT: You do agree with her standard, though, that the legal standard is whether -- drawing all reasonable inferences in favor of the State, the reasonable trier of fact can conclude that the defendant was mentally responsible at the time of the alleged acts.

MR. EDMUNDS: Well, Your Honor, I agree with what the Supreme Court has said the law is, and you've certainly quoted a portion of it, but I think the better rule is what's stated in Freitas and that is, "If the evidence is such that a jury must necessarily have a reasonable doubt as to the defendant's sanity at the time of the commission of the offense, the defendant is entitled to a judgment of acquittal."

And then they go on to modify that by inserting the language you've just quoted.

But I also agree with the Court's assertion that it is the prosecutor who at this point must prove that they can -- that the defense cannot prove beyond a reasonable doubt that he was insane or not responsible at the time. And I think that was, I believe, the Court's question of Miss Futa. And that, I think, is the necessary implication of the first sentence in the Nuetzel case, in Freitas quoting Nuetzel, "If the

examined the testimony or who may give an opinion as to the methodology used or would be to lay witnesses to corroborate perhaps something upon which the doctors relied to base their opinion.

THE COURT: But that does not preclude introduction of that kind of proof. Of course the lay witnesses may not render opinion. They may not render opinion, but that does not preclude lay testimony.

MS. FUTA: May I ask then, it was my understanding under the old law, which provided for a pre-trial motion for judgment of acquittal, that that was done in order to alleviate the problem of going through a full blown evidentiary hearing trial.

THE COURT: At trial.

MS. FUTA: Right.

THE COURT: But what the legislature did in 1972, as the Court understands, is that they removed it from a jury context and placed it in court context prior to trial did not preclude any of the parties to produce the proof that would have been elicited in front of a jury.

In other words, I know that in my experience that the legal lawyers have been using that on the assumption that this was so-called a blue ribbon panel which was definitive, and they were practicing

accordingly. But this was not the law that the -- in fact, I know in most of these motions, the sole basis of the motion or the opposition to the motion would be on the basis of the panel's evaluation.

But the defense is not precluded from calling other experts and neither the prosecution from lay testimony as a foundation. And that, I believe, was totally done. That was not the legislative intent to exclude lay testimony.

MS. FUTA: Well, then it was this prosecutor's error in not bringing forth all of the other evidence that we would have presented at trial. However, I still feel that there has been presented during the hearing enough for you to deny this motion.

THE COURT: Proceed with your argument.

MS. FUTA: Thank you.

THE COURT: But I'm still interested -- and it's not Dr. Khaw. Because I don't see anywhere where she did not admit in her testimony that the defendant at the time of the offenses was suffering from a mental -- I believe she called it a mental disorder. She characterized it as a mental disorder.

And what I'm interested in hearing now from the State is what proof is there that there was no

MOTION

NO. 83-6673

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

RODRIGO RODRIGUES,

Appellant,

vs.

STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO AFFIRM OR DISMISS

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QUESTION PRESENTED

Whether, when pursuant to state statute, a felony defendant is "acquitted" in a pretrial hearing by a trial court judge on the basis of mental disorder excluding penal responsibility, prior to the impaneling of any jury, and in the absence of jury waiver, the State may appeal the "acquittal," have it set aside by an appellate court, and proceed to trial.

OPINION BELOW

The judgment of the Supreme Court of Hawaii is a published opinion reported as *State v. Rodrigues*, 67 Haw. ___, 679 P.2d 615 (1984). A copy of the slip opinion is attached to the Jurisdictional Statement of Defendant.

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NO. 82-6673

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RODRIGO RODRIGUES,

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Appellee.

ON APPEAL FROM

THE SUPREME COURT OF

THE STATE OF HAWAII

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16(1) (a), (b) and (d) of the Supreme Court of the United States, Appellee State of Hawaii (hereinafter "State") moves that the judgment below of the Hawaii Supreme Court be affirmed, or that the appeal (or petition for writ or certiorari) be dismissed, on the grounds that the appeal is not within the jurisdiction of this Court, that the decision below was clearly correct, that there is no conflict in state court opinions, and that this case presents no substantial question of law not previously decided by this Court.

I.

NATURE OF THE CASE

On November 20, 1979, Appellant Rodrigo Rodrigues (hereinafter "Defendant"), a 23 year old United States Marine, was indicted for three counts of first degree sodomy and one count of first degree rape. Defendant's three victims were young girls between the ages of 11 and 13. He lured them into secluded areas, threatened to kill them if they resisted or screamed, and sexually assaulted them.

On March 12, 1980, Defendant filed a notice of intention to rely on the defense of mental disease, disorder, or defect, pursuant to *HAWAII REV. STAT.* § 704-400(1) (1972).[1] Through counsel, he declared himself lacking in substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. He claimed to be suffering from a rare and controversial behavioral pattern: the Multiple Personality Syndrome. Accordingly, Judge Wendell K. Huddy of the First Circuit Court of Honolulu, pursuant to *HAWAII REV. STAT.* § 704-404 (1974), suspended proceedings and appointed a three-member medical panel to examine Defendant and report its findings.[2]

---

[1] *HAWAII REV. STAT.* § 704-400(1) (1972): *Physical or mental disease, disorder, or defect excluding penal responsibility.* A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

[2] *HAWAII REV. STAT.* § 704-404 (1974). *Examination of defendant with respect to physical or mental disease, disorder, or defect.*

(1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been impaneled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution, the court shall appoint a State-employed physician or certified clinical psychologist designated by the director of health from within the department of health and two additional unbiased, qualified physicians, or one qualified physician and one certified clinical psychologist, to examine and report upon the physical and mental condition of the defendant. In each case the court shall appoint no more than one certified clinical psychologist and at least one of the physicians

On June 25, 1982, after extensive psychiatric examination and subsequent treatment resulting in Judge Huddy finding Defendant competent to stand trial, Defendant moved for "acquittal" pursuant to *HAWAII REV. STAT.* § 704-408 (1972), providing for pretrial dismissal of criminal charges "on the ground of physical or mental disease, disorder, or defect excluding responsibility."[3]

Six psychiatarists testified at Defendant's pretrial responsibility hearing, three court-appointed and three called by Defendant. Defendant's experts included Dr. Bernauer Newton, renowned expert on the diagnosis of Multiple Personality Syndrome. On August 27, 1982, Judge Huddy granted Defendant's motion for "acquittal", finding, after weighing the testimony of the psychiatrists, that Defendant's mental disease or defect "substantially impaired the Defendant's capacity to conform his conduct to the requirements of law." *State v. Rodrigues*, Transcript of Proceedings, Cr. No. 53619, August 27, 1982, at pages 60-61.[4]

At no time before, during, or after the pretrial responsibility hearing did Defendant waive his right to trial by jury on any of the issues, actual or potential, in his defense. Judge Huddy granted an "aquittal" pursuant to *HAWAII REV. STAT.* § 704-408 (1972), prior to the impaneling or swearing in of Defendant's jury (which never occurred) and therefore prior to jeopardy attaching in Defendant's case.

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appointed by the court shall be a psychiatrist. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, and may direct that one or more qualified physicians retained by the defendant be permitted to witness and participate in the examination.

[3] *HAWAII REV. STAT.* § 704-408 (1972). *Determination of Responsibility.* If the report of the examiners [appointed by the Court] states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that the impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

[4] *HAWAII REV. STAT.* § 704-408 (1972) was repealed in 1980. The pretrial acquittal procedure involved in this case no longer exists in Hawaii. Defendant was able to utilize the former statutory scheme because the 1980 amendment does not apply to crimes occurring prior to June 7, 1980.

Judge Huddy did not have the authority to convict Defendant of sodomy, rape, or any criminal offense. *HAWAII REV. STAT.* § 704-408 (1972) did not operate to bifurcate Defendant's trial or establish Judge Huddy as a trier-of-fact on the issue of responsibility or insanity. *HAWAII REV. STAT.* § 704-408 (1972) simply provided a pretrial procedure whereby the trial court judge was authorized to issue a judgment of "acquittal" prior to Defendant's exposure to risk of conviction or jeopardy in his prosecution.

The State appealed Defendant's "acquittal" to the Hawaii Supreme Court. Charging that Judge Huddy had weighed the testimony of the six psychiatrists—rather than ruling on the sufficiency of the threshold showing of sanity in order to proceed to trial—the State sought review of the pre-jeopardy "acquittal" under jurisdictional authority of *HAWAII REV. STAT.* § 641-13(2) (1972):

> *[Appeal] by State in criminal cases.* An appeal may be taken by and on behalf of the State from the district or circuit courts direct to the supreme court in all criminal cases, in the following instances:
>
> (2) From an order or judgment sustaining a special plea in bar, or dismissing the case where the defendant has not been put in jeopardy.

On March 8, 1984, the Hawaii Supreme Court issued a three-two split decision reversing the pretrial "acquittal" and ordered Defendant to trial on the merits. Justice Yoshimi Hayashi's majority opinion found "that the trial judge improperly weighed the testimony of the doctors, and acted as a trier-of-fact rather than a judge on the motion of acquittal." *State v. Rodrigues*, 67 Haw. ____, 679 P.2d 615, 621, No. 8865, slip op. at 11 (March 8, 1984).

Justice Edward H. Nakamura filed a 13-page dissent (joined by Justice James H. Wakatsuki) calling the majority holding "unprecedented, unauthorized, and unconstitutional." *Rodrigues, supra*, 679 P.2d at 622, slip op. at 1 (Nakamura, J., dissenting). The dissent did not address the merits of the majority opinion. It omitted any discussion of the standard of review at a responsibility hearing. It ignored the written and oral arguments of the parties. Instead, Justice Nakamura took issue with the majority's preliminary determination to hear the

appeal, announcing, "I would dismiss the appeal for want of jurisdiction." *Rodrigues, supra*, 679 P.2d at 627, slip op. at 13 (Nakamura, J., dissenting). The dissent found that "the defendant was in jeopardy when he sought acquittal and brought forth evidence on an essential element of the crimes charged in the indictment." *Rodrigues, supra*, 679 P.2d at 625, slip op. at 8 (Nakamura, J., dissenting).

Defendant raised no jeopardy issue in his pleadings or argument below. Following Justice Nakamura's spirited *sua sponte* dissent on the issue, however, Defendant applied to the full court for re-briefing and reconsideration on this point. When the court refused, Defendant lodged this "appeal" (petition for certiorari) with the United States Supreme Court.

Defendant's Jurisdictional Statement restates and re-affirms Nakamura's jeopardy dissent. Neither the dissent nor the Jurisdictional Statement, however, addresses the solitary United States Supreme Court case cited by the majority brethren on the Hawaii Supreme Court in support of their acceptance of the appeal. *Serfass v. United States*, 420 U.S. 377, 43 L.Ed.2d 265, 95 S.Ct. 1055 (1975), clearly and unequivocally disposes of the jeopardy argument in this case. Jeopardy has yet to attach in Defendant's prosecution for rape and sodomy. There has been no trial or any portion thereof in this case.[5] Nakamura's suggestion that Defendant was subject to jeopardy when Defendant "brought forth evidence" before the trial court judge applies only in non-jury trials. Thus, in the absence of a jury waiver, Defendant would not be in jeopardy of life or limb until a jury of his peers was impaneled and sworn in at commencement of trial.

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[5] Defendant utilizes the words "further trial" and "retrial" in characterizing the consequences of the Hawaii Supreme Court's reversal of his pretrial "acquittal." *See* Jurisdictional Statement at pp. 6, 8, 9 and 11. Even Defendant's "Question Presented" asks if the State of Hawaii appropriately sought and obtained a "further trial." No trial, of course, has commenced in this case.

The State's response to Defendant's Jurisdictional Statement is twofold. First, Defendant is not properly an "appellant" under 28 *U.S.C.* § 1257(2) (1970). He is not challenging the constitutionality of Hawaii's prosecutorial appellate statute, *HAWAII REV. STAT.* § 641-13(2) (1972), which on its face is limited to orders "where the defendant has not been put in jeopardy." As such, Defendant's appropriate avenue of review before this Court is by petition for writ of certiorari to the Hawaii Supreme Court. Second, Defendant's appeal should be dismissed, or petition denied, inasmuch as the decision of the Hawaii Supreme Court was clearly correct, did not pose any conflict in state court decisions, and failed to raise a substantial question of law not previously resolved by this Court. At the time of the statutory "acquittal", jeopardy had not attached in Defendant's jury trial prosecution for rape and sodomy. As such, appellate review and reversal, and subsequent prosecution for rape and sodomy, did not "trench upon the constitutional prohibition." *See United States v. Zisblatt*, 172 F.2d 740, 743 (2d Cir. 1949) (L.Hand, J.).

II.

ARGUMENT

A. THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT AND SHOULD BE ACTED UPON AS A PETITION FOR CERTIORARI SINCE THE QUESTION DECIDED BY THE STATE COURT WAS WHETHER THE CONSTITUTION ITSELF WOULD PERMIT APPEAL AND SUBSEQUENT PROSECUTION IN THIS CASE.

By filing a discretionary petition for certiorari instead of an appeal, a Supreme Court litigant runs a greater risk of having his case summarily rejected. As such, review properly sought under 28 *U.S.C.* § 1257(3) (1970), prescribing certiorari when a state court denies a federal constitutional claim, is often lodged as an appeal pursuant to 28 *U.S.C.* § 1257(2) (1970).

Under Section 1257(2), "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution" and "the decision is in favor of its validity," an appellant may obtain review by appeal. Section 1257(3) provides for certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . ."

Defendant claims that he drew in question the validity of *HAWAII REV. STAT.* § 641-13(2) (1972) on the ground that its application to him violated the Double Jeopardy Clause of the Fifth Amendment. He therefore filed a *SUP. CT. RULE* 15 Jurisdictional Statement instead of a *SUP. CT. RULE* 23 Petition for Certiorari.

In fact, Defendant's double jeopardy claims originated *sua sponte* at oral argument by two associate justices of the Hawaii Supreme Court. Confronted with the statutory limitation that the State is authorized to appeal from any order dismissing the case "where the defendant has not been put in jeopardy," Justice Nakamura's dissent, and Defendant's claim to this Court, is that:

> [D]efendant was in jeopardy when he sought acquittal and brought forth evidence on an essential element of the crimes charged . . . .

Rodrigues, supra, 679 P.2d at 625, slip op. at 9 (Nakamura, J., dissenting). Thus the constitutionality of *HAWAII REV. STAT.* § 641-13(2) (1970) was not questioned. By virtue of the constitutional limitation to cases "where defendant has not been put in jeopardy," Hawaii's prosecutorial appeal statute cannot, of itself, be deemed to violate the federal constitution. The State's prosecutorial appellate jurisdiction "is as broad as the Constitution permits." *Kulko v. California Superior Court*, 436 U.S. 84, 90, 56 L.Ed.2d 132, 98 S.Ct. 1690 (1978).

Defendant argues that since the majority opinion in *Rodrigues* defined "jeopardy" in a manner that "clearly infringes upon [Defendant's] constitutional protections," it therefore held *HAWAII REV. STAT.* § 641-13(2) (1970) "applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds." Hence, claims Defendant, he has "drawn in question the validity" of *HAWAII REV. STAT.* § 641-13(2) (1970), and a direct appeal to this Court is warranted. Such an argument begs the question. The *Rodrigues* court defined "jeopardy" pursuant to United States Supreme Court precedent, citing *Serfass v. United States*, 420 U.S. 377, 43 L.Ed.2d 265, 95 S.Ct. 1055 (1975). The constitutionality of *HAWAII REV. STAT.* § 641-13(2) (1970) was not at issue.

A similar statute was discussed in *United States v. Wilson*, 420 U.S. 332, 337-338, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975), where the Court reviewed 18 *U.S.C.* § 3731 (1971), which prohibits appeals by federal prosecutors "where the double jeopardy clause of the United States Constitution prohibits further prosecution." The *Wilson* Court concluded that the case before it was "therefore appealable unless the appeal is barred by the Constitution." *Wilson, supra*, 420 U.S. at 339. No suggestion was made by either party in *Wilson* that the jurisdictional statute itself was either "unconstitutional" or "constitutional" on its face.

Kulko v. California Superior Court, supra, briefly addressed this point, reviewing a California jurisdictional statute tied to the Due Process Clause of the Fourteenth Amendment. The *Kulko* Court found that under the wording of the California statute, "the State's jurisdiction is as broad as the Constitution permits." As such, said the Court:

> The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction.

Kulko, supra, 436 U.S. at 90 n.14. In the *Rodrigues* decision, the Hawaii Supreme Court ruled:

> There was no possibility of a conviction, and thus a trial is not barred by the double jeopardy clause of the Fifth Amendment.

Rodrigues, supra, 679 P.2d at 622, slip. op. at 13. The *Rodrigues* court therefore ruled that "the Constitution itself would permit the assertion of jurisdiction." *Kulko, supra*, 436 U.S. at 90.

As such, there is no appellate jurisdiction under 28 *U.S.C.* § 1257(2) (1970) in this case. It should have been filed under *SUP. CT. RULE* 23 as a petition for writ of certiorari. Pursuant to 28 *U.S.C.* § 2103 (1962), this "improvidently taken" appeal should "be regarded and acted on as a petition for writ of certiorari." *Accord: Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958).

B. THE DECISION BELOW IS CLEARLY CORRECT INASMUCH AS — BEFORE SUFFERING DOUBLE JEOPARDY — AN ACCUSED MUST SUFFER PRIOR JEOPARDY WHICH ATTACHES, ABSENT A JURY WAIVER, UPON THE IMPANELING AND SWEARING IN OF A JURY AT TRIAL.

The prohibition against double jeopardy entered American common law through Blackstone's Commentaries. *See* Blackstone, *Commentaries*, 335; *United States v. Wilson*, 420 U.S. 332, 340, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975). James Madison introduced the first draft of a jeopardy prohibition into the Bill of Rights in 1789. *Wilson, supra*, 420 U.S. at 341. The principle that a citizen shall not be placed in danger of life or limb for the same offense more than once is embodied in the Fifth Amendment of the United States Constitution[6] and

[6] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Article I, Section 10 of the Constitution of the State of Hawaii.[7]

The federal Double Jeopardy Clause of the Fifth Amendment has been held applicable to state prosecutions through the application of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969). The United States Supreme Court has identified three fundamental protections in the Double Jeopardy Clause:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction.[8] And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). Focusing on the first protection, this Court has said:

> When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 185, 187-188, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119 (1957).

United States v. Wilson, supra, 420 U.S. at 343.

The Clause, however, was not adopted to prohibit government appeals. It was enacted to foreclose multiple prosecutions. *Wilson, supra*, 420 U.S. at 342. When acquittal consists merely of a dismissal by a trial court judge upon conclusion of law, rather than a weighing of the State's evidentiary case, an appeal "does not trench upon the constitutional prohibition." *United States v. Zisblatt*, 172 F.2d

[7] "[N]or shall any person be subject for the same offense to be twice put in jeopardy . . . ."

[8] This second protection does not prevent retrial if the conviction is set aside by defendant on grounds of procedural error. *North Carolina v. Pearce, infra*, 395 U.S. at 718.

740, 743 (2d Cir. 1949) (L. Hand, J.). Judge Hand concludes:

> [A]lthough the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed on his guilt or not, it does not extend that privilege to mistakes in his favor by judges.

Zisblatt, supra, 172 F.2d at 743.

Most of this Court's holdings on the scope of the Clause's first protection are of recent vintage. *See e.g., United States v. Scott,* 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978); *Sanabria v. United States,* 437 U.S. 54, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978); *Burks v. United States,* 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978); *United States v. Martin Linen Supply,* 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977); *Serfass v. United States,* 420 U.S. 377, 43 L.Ed.2d 265, 95 S.Ct. 1055 (1975); *Wilson, supra.* Government appeals after acquittal were largely proscribed by statute until a 1970 Federal Criminal Appeals Act revision broadened the scope of prosecutorial appeals to the limits of the Double Jeopardy Clause. *Wilson, supra,* 420 U.S. at 337-338 [citing 18 *U.S.C.* § 3731 (1971)]. With statutory limitations removed, the courts have assumed the responsibility of establishing the extent of governmental appeals after dismissal or "acquittal" of a defendant by a trial court judge. A similar enlargement of scope has occurred in state appellate jurisdictional statutes. The new federal statute, 18. *U.S.C.*§ 3731 (1971)[9], like the Hawaii statute utilized by the State in this case, *HAWAII REV. STAT.* § 641-13(2) (1972)[10], permits any such appeal that does not "trench upon the constitutional prohibition:"

> Congress decided to rely on the courts to define the constitutional boundaries rather than to create a statutory scheme that might be in some respects narrower or broader than the Fifth Amendment would allow.

[9] ". . . from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

[10] ". . . from an order or judgment . . . dismissing the case where the defendant has not been put in jeopardy."

Wilson, supra, 420 U.S. at 339. Like the appeal rights extended to federal prosecutors in 18 *U.S.C.* § 3731 (1971), a dismissal pursuant to *HAWAII REV. STAT.* § 641-13(2) is "therefore appealable unless the appeal is barred by the Constitution." *Wilson, supra,* 420 U.S. at 339.

The three-judge majority on the Hawaii Supreme Court in this case made only brief mention of the issue of jeopardy. The opinion, however, succinctly resolved the jeopardy issue by relying on a recent United States Supreme Court case in its determination to review the pretrial "acquittal" of Defendant Rodrigo Rodrigues:

> Under *H.R.S.* § 641-13(2), an appeal may be taken by and on behalf of the State "from an order or judgment, sustaining a special plea in bar, or dismissing a criminal case where the defendant has not been put in jeopardy." Double jeopardy does not attach unless there is a risk of a determination of guilt. *Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).
>
> Here no jeopardy attached. This was a pretrial motion to determine whether defendant at the time of the offense charged was unable to appreciate the wrongfulness of his conduct or to control his conduct to the requirements of the law. There was no possibility of a conviction, and thus a trial is not barred by the double jeopardy clause of the Fifth Amendment.

Rodrigues, supra, 679 P.2d at 622, slip op. at 13.

Justice Nakamura's dissent in *Rodrigues, supra,* ignored the majority concern with attachment of jeopardy, and the dictates of *Serfass, supra.* In fact, the dissent never mentioned *Serfass,* or cited any Hawaii or federal case addressing risk of conviction or attachment of jeopardy.[11]

Defendant's Jurisdictional Statement was likewise silent on this point. Instead, Defendant and the dissent discussed and interpreted *United States v. Scott,* 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978), and *United States v. Martin Linen Supply*

[11] The dissent suggests that "a direct acquittal on a motion submitted before actual trial has not [been] discussed in the relevant case law." *Rodrigues, supra,* 679 P.2d at 626, slip op. at 8 (Nakamura, J. dissenting). This statement ignores *Serfass v. United States, supra,* cited by the majority, which did precisely that.

Co., 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977), two cases applying the Double Jeopardy Clause to appeals following acquittals issued during the pendency of jury trials. No issue involving the attachment of initial jeopardy existed in *Scott* or *Martin Linen Supply*.

Serfass, supra, is dispositive of this case. Regardless of the nature of the "acquittal" or "dismissal" meted out by a trial court judge, if a jury has not been waived, or impaneled, jeopardy has not attached and double jeopardy cannot occur:

> [T]he courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy."

Serfass, supra, 420 U.S. at 388. In the case of a jury trial, a long line of state and federal cases make it clear that jeopardy attaches when a jury is impaneled and sworn. *See Illinois v. Somerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066 (1973); *Downum v. United States*, 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033 (1963). In a non-jury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936). According to *United States v. Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971), jeopardy does not attach and the constitutional prohibition can have no application until a defendant is "put to trial before the trier of facts." *See also Collins v. Loisel*, 262 U.S. 426, 429, 67 L.Ed. 1062, 43 S.Ct. 618 (1923); *Bassing v. Cody*, 208 U.S. 386, 391-392, 52 L.Ed. 540, 28 S.Ct. 392 (1908); *United States v. McDonald*, 207 U.S. 120, 127, 52 L.Ed. 130, 28 S.Ct. 53 (1907); *Kepner v. United States*, 195 U.S. 100, 128, 130-131, 49 L.Ed. 114, 24 S.Ct. 797 (1904).

The federal rule that jeopardy attaches when the jury is impaneled and sworn was held to be constitutionally mandated and thus binding on the states through the Fourteenth Amendment in *Crist v. Bretz*, 437 U.S. 28, 57 L.Ed.2d 24, 98 S.Ct. 2156, 10 Ohio Ops. 3d 466 (1978):

> This case, however, presents a single straightforward issue concerning the point during a jury trial when a defendant is deemed to have been put in jeopardy, for only if that point has once been reached does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play.

Crist, supra, 437 U.S. at 32-33 (citing *Serfass, supra*, 420 U.S. at 388). In *Crist* the Ohio state jeopardy statute provided for attachment of jeopardy at jury trials when "the first witness is sworn," similar to the standard applied in non-jury trials. *Crist, supra*, 437 U.S. at 32. Arguing that the Double Jeopardy Clause contained no express language defining attachment of jeopardy in jury cases, the State of Ohio determined to establish its own standard. This Court rejected the Ohio variation:

> [T]he federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns . . . .
>
> [T]he time when jeopardy attaches "serves as a lynchpin for all double jeopardy jurisprudence" [citation omitted]. The federal rule that jeopardy attaches when the jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

Crist, supra, 437 U.S. at 37-38.[12]

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[12] State court law is in accord. Defendant suggests that "the decision of the Hawaii Supreme Court appealed from stands in conflict with the decisions of at least two other state courts of last resort." *See* Jurisdictional Statement at 13, note 3. Defendant is mistaken. *State v. Abraham*, 335 N.W.2d 745 (Minn. 1983), and *State v. Greenwalt*, 663 P.2d 1178 (Mont. 1983), both involved "acquittals" issued by trial court judges after jeopardy had attached, non-jury in *Abraham*, and jury in *Greenwalt*. Indeed, Montana's Supreme Court was cited by the majority in *Rodrigues* in a case on point rejecting jeopardy concerns after appeal of a pretrial mental responsibility acquittal. *See Rodrigues, supra*, 679 P.2d at 622, slip op. at 12-13, citing *State v. Hagerud*, 174 Mont. 361, 570 P.2d 1131 (1977). State courts have "generally fixed the attachment of jeopardy at the swearing of the jury." *Crist, supra*, 437 U.S. at 47 (citing South Carolina, North Carolina, Tennessee, Pennsylvania, Vermont, Indiana, California, Georgia, Mississippi, Nevada, Ohio, Arkansas, Michigan, Massachusetts, Louisiana, Wisconsin, Minnesota, New York, Maryland, New Jersey and the District of Columbia).

In *Serfass, supra*, this Court dealt definitively with jeopardy analysis in the context of government appeals following pretrial dismissal or acquittal. In *Serfass* defendant moved to dismiss an indictment for draft evasion in the United States District Court for the Middle District of Pennsylvania. His motion was granted, but only after a hearing during which the judge considered affidavits and oral stipulations of fact. The government appealed. Characterizing the dismissal as the "functional equivalent of an acquittal on the merits," defendant claimed that considerations of double jeopardy barred appellate review. The Third Circuit Court of Appeals, and subsequently the United States Supreme Court, disagreed. The word "acquittal," said this Court:

> has no significance in this context unless jeopardy has once attached and an accused has been subjected to risk of conviction.

Serfass, supra, 420 U.S. at 392.

Defendant in *Serfass* argued that "evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial," were relied on by the trial judge in reaching his decision to "acquit." 420 U.S. at 390. As such, said defendant, "constructively jeopardy has attached." 420 U.S. at 390. Hawaii's Justice Nakamura makes a similar argument in his dissent in *Rodrigues:*

> [D]efendant was in jeopardy when he sought acquittal and brought forth evidence on an essential element of the crimes charged in the indictment .... [T]he die was cast when the claim of irresponsibility was advanced. The defendant committed himself thereby to pursue the defense of insanity to judgment, for he could not hope thereafter to controvert testimony that he had engaged in the proscribed conduct. Realistically, he ran a substantial risk of conviction by moving for an early determination of part of the general issue in the case and proceeding to a hearing.

Rodrigues, supra, 679 P.2d at 626, slip op. at 9 (Nakamura, J., dissenting). Nakamura cites no authority for his argument of

"constructive jeopardy."[13] *Serfass* is persuasive authority to the contrary:

> Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused."

Serfass, 420 U.S. at 391 [citing *Kepner v. United States*, 195 U.S. 100, 133, 49 L.Ed. 114, 24 S.Ct. 797 (1904)]. The scope of Justice Nakamura's jeopardy definition must be viewed in light of other pretrial proceedings. The argument that defendants are "in jeopardy" whenever they "bring forward evidence on an essential element of the crimes charged" would result in double jeopardy considerations arising at suppression motions, preliminary hearings, and grand jury proceedings. This is not the law.[14] Hawaii Circuit Court Judge Wendell K. Huddy had no jurisdiction to convict Defendant of any crime at the pretrial responsibility hearing conducted pursuant to *HAWAII REV.*

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[13] The dissent cites *Breed v. Jones*, 421 U.S. 519, 528, 44 L.Ed.2d 346, 95 S.Ct. 1779 (1975), for the premise that "[j]eopardy denotes risk." While this is true, *Breed* does not support attachment of jeopardy in jury trials prior to impaneling of a jury. The *Breed* Court found the Double Jeopardy Clause applicable to "juvenile adjudicatory proceedings," since their object was "to determine whether [the accused had] committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Breed*, 421 U.S. at 529. Juveniles have no right to trial by jury. Jeopardy thus attached when evidence was adduced at the adjudicatory proceeding. Judges in juvenile proceedings can "convict." Judges considering "acquittal" in a Hawaii responsibility hearing pursuant to *HAWAII REV. STAT.* § 704-408 (1972) have no such authority.

[14] "[A] judgment in a preliminary hearing examination discharging an accused person for want of probable cause is not conclusive upon the question of his guilt or innocence and constitutes no bar to a subsequent trial in the court to which the indictment is returned." *Morse v. United States*, 267 U.S. 80, 85, 69 L.Ed. 522, 45 S.Ct. 209 (1925). *Accord: Collins v. Loisel*, 262 U.S. 426, 429, 67 L.Ed. 1062 43 S.Ct. 618 (1923); *Kepner v. United States*, 195 U.S. 100, 126, 49 L.Ed. 114, 24 S.Ct. 797 (1905).

STAT. § 704-408.[15] Defendant was never "in jeopardy of life or limb."

The error in the *Rodrigues* dissent is made clear by reference to Justice Hugo Black's opinion in *Green v. United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 A.L.R.2d 1119 (1957), an often-quoted justification for the double jeopardy prohibition:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed *to make repeated attempts to convict* an individual for an alleged offense . . . .
>
> The constitutional prohibition against "double jeopardy" was designed to protect an individual from *being subjected to the hazards of trial and possible conviction* more than once for an alleged offense.

Green, supra, 355 U.S. at 187 (emphasis supplied). The highlighted language emphasizes the component of risk in jeopardy associated with possible conviction:

> Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.

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[15] The *Rodrigues* majority found "that the trial judge improperly weighed the testimony of the doctors, and acted as a trier-of-fact rather than a judge on the motion of acquittal." *Rodrigues, supra*, 679 P.2d at 621, slip op. at 11. The dissent disagreed. Justice Nakamura noted the word "satisfied" in *HAWAII REV. STAT.* § 704-408 (1972), and suggested that Judge Huddy could therefore weigh the medical evidence at the pretrial hearing and serve as a fact-finder on the issue of insanity. *Rodrigues, supra*, 679 P.2d 627 n.13, slip op. at 11-12 n.13 (Nakamura, J., dissenting). The latter interpretation is untenable. At no time during the responsibility hearing could Judge Huddy have found in favor of the State on the issue of insanity, except to deny Defendant's motion and pass the issue on to the trial jury. Defendant's election to move for pretrial "acquittal" under Section 704-408 did not bifurcate the trial into judge and jury fact-finding roles. Only the jury could establish guilt or innocence. In any event, Defendant cannot challenge the scope of Judge Huddy's pretrial authority at this time. The Hawaii Supreme Court is charged with interpreting Hawaii law, and the *Rodrigues* majority ruling is binding on this point.

Serfass, supra, 420 U.S. at 391-92. Defendant's extensive analysis of the evidentiary nature of his pretrial "acquittal" is rendered irrelevant by the timing of Judge Huddy's ruling:

> [T]he language of cases in which we have held that there can be no appeal from, or further prosecution after, an "acquittal", cannot be divorced from the procedural context in which the action so characterized was taken.

Serfass, supra, 420 U.S. at 392. Finally:

> [A]n accused must suffer jeopardy before he can suffer double jeopardy.

Serfass, supra, 420 U.S. at 393.

The question of timing of attachment of jeopardy in a jury trial, and the appealability of a pre-jeopardy "acquittal", involve complex issues of policy and constitutional analysis. As recently as 1975, when this Court issued the *Serfass* opinion, the jeopardy status of defendants in pretrial hearings was in dispute. The question, however, has been resolved. The Nakamura dissent and the discussion in Defendant's Jurisdictional Statement on the scope of *HAWAII REV. STAT.* § 704-408 (1972) "acquittals" ignore this threshold issue of double jeopardy doctrine. Indeed, the Nakamura dissent is re...iniscent of Justice William Douglas' dissenting words in the *Serfass* case:

> Mr. Justice Douglas dissents, being of the view that the ruling of the District Court was based on evidence which could constitute a defense on the merits and therefore caused jeopardy to attach.

Serfass, supra, 420 U.S. at 395. While Justice Douglas' objection is clear, his dissent provides no authority, precedent or persuasive logic for moving the attachment of jeopardy to a point prior to the impaneling and swearing in of the jury.

An accused must suffer jeopardy before he can suffer double jeopardy. Unless the prosecutor's evidentiary presentation at a pretrial responsibility hearing carries a potential for criminal conviction, Defendant is not at risk or "in jeopardy of life or limb." The State may appeal such an "acquittal", and if successful, proceed to trial.

III.

CONCLUSION

This appeal is not subject to the jurisdiction of 28 *U.S.C.* § 1257(2) (1970) because the question decided by the Hawaii Supreme Court was whether the Constitution itself permitted the appeal of Defendant's pretrial "acquittal". Under 28 *U.S.C.* § 2103 (1962), Defendant's Jurisdictional Statement should "be regarded and acted on as a petition for certiorari."

The decision below was clearly correct. In the absence of jury waiver, and prior to the impaneling and swearing in of a jury, no jeopardy attaches in a criminal case. *State v. Rodrigues, supra*, presents no conflict in state court decisions, and poses no substantial question of law not previously decided by this Court.

The judgment below should be affirmed, or the appeal (or petition for writ of certiorari) dismissed, without further argument.

Dated at Honolulu, Hawaii: July 30, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PETER VAN NAME ESSER, a member of the Bar of the Supreme Court of the United States and counsel of record for Appellee herein, hereby certify that on August 1, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Motion to Affirm or Dismiss on Rodrigo Rodrigues, Appellant herein, by delivering the copies thereof to John S. Edmunds, attorney of record for Appellant above-named, at his office located at 841 Bishop Street, Suite 2104, Honolulu, Hawaii 96813.

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REPLY BRIEF

ORIGINAL

NO. 83-6673

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RODRIGO RODRIGUES, Appellant

v.

STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME COURT OF HAWAII

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

REPLY BRIEF

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In this double jeopardy case, Appellee State of Hawaii places entire reliance on this Court's holding in Serfass v. United States, 420 U.S. 377 (1975). Motion to Affirm or Dismiss, 9-18. The State relies upon the bright-line distinction drawn in Serfass between proceedings prior to the impaneling of a jury, where jeopardy was held not to attach, and proceedings after jury impanelment, when jeopardy attached.

Serfass, however, and this pre-impanelment/post-impanelment distinction, do not survive this Court's reassessment of the double jeopardy doctrine which occurred during its 1978 term. A series of cases in that term -- Burks v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978); Christ v. Bretz, 437 U.S. 28 (1978); Sanabria v. United States, 437 U.S. 54 (1978); and United States v. Scott, 437 U.S. 82 (1978) -- with Burks and Scott most nearly on point here -- makes it clear that this Court has abandoned the simplistic approach of Serfass to the double jeopardy consequences of a pre-verdict termination in the defendant's favor. This Court's 1978 cases have shifted the question of whether jeopardy had attached from the simple issue of whether or not a jury had been impaneled to the question whether ". . . the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), quoted in United States v. Scott, supra, at 437 U.S. 97. The 1978 cases distinguish such a resolution of factual elements of the offense charged in the defendant's favor from a pretrial dismissal or acquittal based upon purely legal issues, where jeopardy is held not to attach and a retrial is not precluded. Thus, in United States v. Scott, supra, where the defendant's motion to dismiss was on the basis of preindictment delay -- a purely "legal" defense -- this Court held that

> . . . the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause . . .

Id. at 437 U.S. 98-99. [emphasis added] On the other hand, when the ruling below does represent a "resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged," United States v. Martin Linen Supply Co., supra; United States v. Scott, supra, the bar of double jeopardy does attach. Both Burks, supra, and Scott, supra, explicitly recognize the "essentially factual defense of insanity," Scott, supra, at 437 U.S. 98, as a defense, the resolution of which below causes jeopardy to attach. 1/

In Burks, supra, where the defendant raised the defense of insanity, the trial court denied a motion for

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1/ That the holding of Serfass does not survive this Court's 1978 cases should be apparent from Chief Justice Burger's opinion for the Court in Burks, supra, where, after discussing and quoting from Green v. United States, 355 U.S. 184 (1957); Serfass, supra, and United States v. Jorn, 400 U.S. 470 (1971), the Chief Justice wrote: "Nevertheless, as the discussion in Part II, supra, indicates, our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands. A close re-examination of those precedents, however, pursuades us that they have not properly construed the Clause, and accordingly should no longer be followed. Burks, supra, at 437 U.S. 12. [emphasis added]

judgment of acquittal before the case was submitted to the jury. After a jury verdict of guilty, Burks filed a timely motion for a new trial, maintaining, among other things, that "[t]he evidence was insufficient to support the verdict." Burks, supra, at 437 U.S. 3. The District Court denied that motion; on appeal, the Court of Appeals agreed with the defendant's claim that the evidence was insufficient to support the verdict and reversed his conviction. Id. In holding that a new trial of defendant was barred on double jeopardy grounds, this Court made it clear that the critical issue barring such a trial was not the fact that the determination of the insufficiency of the evidence was made after a jury had been impaneled, but rather that the judgment resolved the issue of the sufficiency of the evidence of insanity, a factual element of the offense charged.

> It is unquestionably true that the Court of Appeals decision "represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 134, 51 L.Ed.2d 642 (1977). By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, the Court was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing Court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. See Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed. 2d 629 (1962); Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). Consequently, as Mr. Justice Douglas correctly perceived in Sapir, it should make no difference that the reviewing Court, rather than the trial court, determined the evidence to be insufficient, See 348 U.S., at 374, 75 S.Ct. 422, 99 L.Ed. 426. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal.

Burks, supra, at 437 U.S. 10-11. [emphasis added]

The instant case is precisely that postulated by Chief Justice Burger in the Court's opinion in Burks.

Defendant's "sanity" was an element of the offense charged.[2] The judgment of acquittal below represented a ruling by the trial court that the State had failed to present sufficient evidence upon which a rational jury could find the defendant responsible under H.R.S. § 704-400(1), that is, "sane". State v. Nuetzel, 61 Hawaii 531, 606 P.2d 920 (1980); State v. Freitas, 62 Hawaii 17, 608 P.2d 408 (1980); State v. Summers, 62 Hawaii 325, 614 P.2d 925 (1980). As this Court held in Burks, supra, such a ruling triggers the protections of the Double Jeopardy Clause:

> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not even have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, supra, at 437 U.S. 16.

Here the State has had one full and fair opportunity to offer whatever proof it could assemble on the factual element of Defendant's "sanity" at the time of the offenses. The showing it made was insufficient to persuade the trial court that a rational jury might return a verdict of guilty. As this court held in Burks, supra, "[g]iven the requirements for entry of a judgment of acquittal, the

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2/ "The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as: (a) are specified by the definition of the offense, and (b) negative a defense.", H.R.S. § 702-205; "Physical or mental disease, disorder or defect excluding responsibility is a defense.", H.R.S. § 704-402. [emphasis added]

purposes of the Clause would be negated were we to afford the Government an opportunity for the proverbial "second bite at the apple." Burks, supra, at 437 U.S. 17. This is the teaching of this Court's 1978 cases, in particular Burks v. United States, supra, and United States v. Scott, supra, which, as to a pretrial acquittal based upon insufficiency of the evidence going to a factual element of the offense charged -- precisely the instant case -- overrule Serfass v. United States, supra, relied upon by the State of Hawaii here.

Appellee's Motion to Affirm or Dismiss should be denied; this Court should note probable jurisdiction of this appeal, or, pursuant to 28 U.S.C. § 2103, treat the instant papers as a Petition for a Writ of Certiorari and grant that Writ.

Respectfully submitted.

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